88-1425

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

TOWNSHIP OF PLYMOUTH,

Petitioner,

v.

COUNTY OF MONTGOMERY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

STEPHEN M. FELDMAN
1715 Rittenhouse Square
Philadelphia, PA 19103
(215) 546-2604
Counsel of Record

and

ARTHUR LEFKOE
WISLER, PEARLSTINE, TALONE,
CRAIG & GARRITY
Norristown, PA 19401-4880
(215) 272-8400

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Is an appellant's constitutional right to due process of the law under the Fourteenth Amendment to the United States Constitution violated when a state appellate court, without notice *sua sponte* raises and bases its decision upon a new issue about which appellant had not presented evidence or argument because a court-approved stipulation expressly limited the issues at trial?

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TOWNSHIP OF PLYMOUTH,

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v.

COUNTY OF MONTGOMERY,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

—o—

The petitioner Township of Plymouth respectfully prays that a Writ of Certiorari issue to review the judgments and opinion of the Commonwealth Court of Pennsylvania entered in these proceedings on September 8, 1987.

—o—

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania has been reported at 109 Pa. Cmwlth. 200, 531 A.2d

49 (1987). The opinions of the Court of Common Pleas of Montgomery County have not been reported.

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JURISDICTION

The judgments of the Commonwealth Court of Pennsylvania were dated and entered on September 8, 1987. Petitioner filed a timely application for reargument which was denied on November 20, 1987. Thereafter, petitioner filed a timely petition for allowance of appeal to the Supreme Court of Pennsylvania which was denied on October 4, 1988. Petitioner filed a timely application for reconsideration of the denial of the petition for allowance of appeal which was denied on November 28, 1988, and this petition for a writ of certiorari was filed timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1: [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

———o———

STATEMENT OF THE CASE

Plymouth Township (petitioner) filed an action in equity to enjoin Montgomery County (respondent) from

carrying out its announced intention to erect a 1,200 ton per day trash to steam plant on land it owned in the township in flagrant violation of the township's zoning ordinances and related ordinances. Petitioner also brought a declaratory judgment action against respondent seeking a declaration that petitioner's zoning ordinance, which permits only a 250 ton per day trash to steam plant, is applicable to respondent's proposed 1,200 ton per day trash to steam plant, and that respondent is required to comply with petitioner's other ordinances regarding siting, sizing, construction, and development of land.

In the equity action, respondent filed a counterclaim seeking to enjoin petitioner from enforcing its ordinances and from preventing or delaying the construction and operation of the proposed 1,200 ton per day trash to steam plant. Subsequently, the parties agreed to the consolidation of the two actions, and stipulated that Phase I of the trial would be limited to the issue of whether the court lacked jurisdiction because respondent failed to exhaust administrative remedies and whether petitioner's zoning ordinances and other ordinances were preempted by state law. The parties also stipulated that all other issues would be tried subsequently if necessary.

Following a non-jury trial limited to the issues of jurisdiction and preemption, the Court of Common Pleas of Montgomery County issued judgment against petitioner and in favor of respondent, enjoining petitioner from interfering with the construction and operation of the proposed 1,200 ton per day trash to steam plant, and holding that respondent was not required to exhaust its administrative remedies as required by the Pennsylvania Mu-

nicipalities Planning Code and that the Pennsylvania Solid Waste Management Act totally preempted petitioner's zoning ordinances and its other ordinances.

Petitioner appealed to the Commonwealth Court of Pennsylvania. The Commonwealth Court affirmed in part and reversed in part the orders of the Court of Common Pleas. The Commonwealth Court reversed the portion of the trial judge's orders which held that the petitioner's laws requiring building permits, sewage permits, and the filing of land development and subdivision plans were not enforceable as to the respondent's proposed construction of a 1,200 ton per day trash to steam plant. The Commonwealth Court also disagreed with the trial judge that petitioner's zoning ordinances and general ordinances were totally preempted by the Pennsylvania Solid Waste Management Act. The Commonwealth Court held that only the operational aspects of petitioner's ordinances were preempted. However, the Commonwealth Court held that although the nonoperational aspects of petitioner's ordinances were not preempted, they were, nevertheless, invalid as spot zoning. Although the parties had expressly stipulated with the approval of the trial judge to limit the issues at trial to preemption and jurisdiction and to defer presenting evidence and argument on all other issues, which would include spot zoning, to a subsequent trial if necessary, the Commonwealth Court, without any prior notice to the parties, *sua sponte* raised for the first time the issue of spot zoning. The trial judge had not discussed or relied upon spot zoning in reaching his decision, the parties had not argued spot zoning in either the Common Pleas Court or the Commonwealth Court, and because the trial was limited to the issue of jurisdiction and preemp-

tion, the parties, especially petitioner, did not submit evidence on the question of spot zoning.

After the Commonwealth Court raised the issue of spot zoning for the first time in the litigation, petitioner filed a timely application for reargument in the Commonwealth Court. The argument on page four of Plymouth Township's Application For Reargument in The Commonwealth Court was entitled "The Decision Of This Court Insofar As It Is Based On The Issues Of Spot Zoning Improperly Deprives Plymouth Township Of Due Process Of The Law Under The Fourteenth Amendment Of The United States Constitution."

The Commonwealth Court denied petitioner's application for reargument. Petitioner then filed in the Supreme Court of Pennsylvania a Motion To Establish A Briefing And Oral Argument Schedule Or, Alternatively, Petition For Allowance Of Appeal. On page thirty of the aforesaid petition for allowance of appeal the argument was entitled "Without Any Prior Notice To The Parties, The Commonwealth Court *Sua Sponte* Based Its Decision On The Issues Of Spot Zoning In Contradiction Of The Stipulation Of The Parties Which Limited The Issues At Trial, Thus Depriving The Township Of Its Constitutional Rights To Due Process, Its Constitutional Right To Appeal, And Its Right To Counsel" and on page thirty-four the argument was entitled "The Decision Of The Commonwealth Court Insofar As It Is Based On The Issue Of Spot Zoning Improperly Deprives Plymouth Township Of Due Process Of The Law Under The United States And Pennsylvania Constitution And The Right To An Appeal Under The Pennsylvania Constitution."

The Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal, and petitioner timely filed an Application For Reconsideration Of Denial Of Petition For Allowance Of Appeal which the Court denied on November 28, 1988.

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REASONS FOR GRANTING THE WRIT

I. THE COMMONWEALTH COURT OF PENNSYLVANIA DECIDED PLAINTIFF-PETITIONER'S APPEAL IN A MANNER WHICH IS INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT

A. The Commonwealth Court of Pennsylvania, Inconsistent with Applicable Decisions of This Court, Denied Plaintiff-Petitioner's Appeal Based on an Issue Which Had Not Been Litigated at the Trial of a Case Where the Issues Involved Were Specifically Limited by a Stipulation Approved by the Trial Judge

The Commonwealth Court of Pennsylvania's complete disregard of the stipulation entered into by the parties and the resulting impairment of the plaintiff-petitioner's ability to adequately present its case violated the Fourteenth Amendment to the United States Constitution. Under the Fourteenth Amendment, the parties to a civil action are entitled to procedural due process of law which includes the right to notice and the right to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). As this Court held in the *Fuentes* case:

> For more than a century, the central meaning of procedural due process has been clear: 'Parties whose

> rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.'

407 U.S. at 80, 92 S.Ct. at 1994.

The right to be heard must necessarily embody an entitlement to present claims and raise relevant issues. *Holt v. Commonwealth of Virginia,* 381 U.S. 131, 136, 85 S.Ct. 1365, 1378, 14 L.Ed.2d 290 (1965). Basic fairness dictates that a tribunal provide the parties with the ability to ascertain and contest the issues which will be dispositive of the matter. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 105, 83 S.Ct. 1175, 1181, 10 L.Ed. 2d 224 (1963).

It was fundamentally unfair for the Commonwealth Court of Pennsylvania to *sua sponte* raise and decide the issue of spot zoning where the trial below was specifically limited to evidence and argument concerning preemption and jurisdiction. The record clearly establishes that the Commonwealth Court never bothered to indicate to the parties that it would be considering the issue of spot zoning. Plaintiff-petitioner had no opportunity to present evidence on this issue, since it had abided by the stipulation and restricted the evidence introduced and argued from. Clearly, unbridled judicial discretion without concern for the abilities of the parties to adequately present their position is violative of due process. *In Re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948).

———o———

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgments and opinion of the Commonwealth Court of Pennsylvania.

Respectfully submitted,

STEPHEN M. FELDMAN
1715 Rittenhouse Square
Philadelphia, PA 19103
(215) 546-2604
Counsel of Record

and

ARTHUR LEFKOE
WISLER, PEARLSTINE, TALONE,
CRAIG & GARRITY
Norristown, PA 19401-4880
(215) 272-8400
Attorneys for Petitioner

APPENDIX

Township of Plymouth, Appellant *v.* County of Montgomery, Appellee.

Township of Plymouth, Appellant *v.* County of Montgomery, Appellee.

Argued June 10, 1987, before President Judge CRUMLISH, JR., and Judges CRAIG, MACPHAIL, DOYLE and BARRY.

OPINION BY JUDGE CRAIG, September 8, 1987:

In this case, where a proposed county refuse disposal plant faces prohibition by township enactments, we

must recognize statutory and judicial distinctions between ordinance provisions governing *where* the location of the facility may be (zoning provisions) and, on the other hand, *how* it may be technically designed and operated (operational regulations).

Such an analysis, mindful of a meaningful classification of local enactments, is necessary to resolve this case's two chief issues:

> 1. Did the trial court, in an equity and declaratory judgment proceeding, have subject matter jurisdiction to decide ordinance validity questions without requiring the county first to exhaust administrative remedies for the invalidation of zoning provisions under the Pennsylvania Municipalities Planning Act (MPC)?[1]
>
> 2. Has the Solid Waste Management Act[2] preempted the township's power to enact and enforce both the operational regulations and the zoning provisions on which it seeks to rely?

The Proceedings

In the Court of Common Pleas of Montgomery County, Plymouth Township simultaneously filed declaratory judgment and equity actions against Montgomery County, seeking a declaration that the county's proposed 1200-ton-per-day resource recovery facility, a trash-to-steam refuse disposal plant, would violate township ordinances, and also seeking an injunction to bar the county from further action to effectuate that project.

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[1] Act of July 31, 1968, P.L. 805, *as amended*, §1004, 53 P.S. 11004.

[2] Act of July 7, 1980, P.L. 380, §§101-1003, 35 P.S. §§6018.101-6018.1003.

After Judge CORSO denied the township's request for a temporary restraining order, the county responded to the complaints and, in the equity action, by counterclaim sought to have the court invalidate the ordinances and enjoin the township from blocking construction and operation of the proposed plant.

Following the court's rejection of the township's preliminary objections to the counterclaim, the parties stipulated to the consolidation of the two cases and agreed to an initial trial phase limited to evidence pertinent to the issues of jurisdiction and preemption.

After a thorough hearing, the trial judge, Judge BUCHER, issued an adjudication in which he adopted numerous detailed findings of fact and conclusions of law, pursuant to which he ruled the questioned ordinance provisions to be unenforceable with respect to the county's proposed plant. He granted the county's counterclaim by enjoining the township from taking any action against the county's project other than comments and objections to the Department of Environmental Resources (DER) and the Environmental Hearing Board. He confirmed that decision following post-trial motions.

Following the township's appeals to this court, the county sought the application of extraordinary jurisdiction by the Supreme Court, which remanded the case to this court for expedited disposition.

Facts

This court, after reviewing the record, discerns no abuse of discretion by the trial judge with respect to the findings of fact, in that the record contains substantial evidence supporting all of them. Reference to specific findings will follow, as pertinent.

A condensed chronology of events, drawn from those findings, can provide the factual background for analy-

thorized the county to develop a countywide waste management plan under the SWMA. After the county, in 1983 and 1984, in consultation with the municipalities, considered the establishment of an 1800-ton-per-day plant in the township for the district in which the township was located, a Montgomery County Solid Waste Management Committee, on which the township was represented, proceeded in 1985 to prepare a request for proposals (RFP) for a 1200-ton-per-day plant to be located on county-owned property in the township. In February of that year, a letter of the township solicitor indicated that there would be "no problem" with that size of plant.

On April 15, 1985, the township adopted an amendment to its zoning ordinance, establishing a 121-acre resource recovery district and allowing a plant of 1200-ton (throughput) capacity, with height maximum at 165 feet.

However, after the development of community opposition to such a plant in the township, the township council proceeded on April 29, 1985 to repeal that zoning amendment, only two weeks after its enactment. Although the stated reason for the repeal was inadequate advertising, the township did not attempt to readvertise it.

After the county had issued the RFP for the 1200-ton facility on May 7, 1985, the township council issued a public declaration on May 29 that they were "unanimously opposed" to any type of solid waste disposal facility within the township.

Thereafter, in connection with township deliberations, the township solicitor advised the council that "limitation of tonnage for trash transfer stations" could be illegal, and also that this court had decided that zoning could not be used to regulate the method of operation of a landfill or trash transfer station.

On July 8, 1985, the township passed the three ordinances chiefly at issue here, Nos. 934, 936 and 937.

In December, 1985, the county completed and adopted its Municipal Waste Management Plan calling for development of the 1200-ton facility within the district designated by the township for a resource recovery facility. After DER issued preliminary approval of the plan, the county entered into contracts with private companies to construct and operate the plant in question. Seventeen of the twenty-four municipalities in the district have contracted with the county to take their municipal waste for disposal at the plant. The County Industrial Development Authority has also issued bonds to finance the construction costs.

While the DER approval process was underway in 1986, the township advised the county that the township regarded the proposed facility as "illegal" and that the township would not issue a permit for it unless a court invalidated the township ordinances.

This litigation followed.

Provisions of the Ordinances

Ordinance No. 934, the Solid Waste Management Ordinance, is not part of the township's Zoning Ordinance. It regulates the processing and disposal of waste by requiring operators to obtain permits, pay permit application fees up to $100,000 and pay user fees of $.50 per ton for waste processed. That ordinance also regulates the disposal of waste at the facility, and the transportation of waste with respect to details of routing and route cleaning, vector control, vehicle size and emergency operational plans.

Ordinance No. 936, a zoning ordinance amendment, reestablishes the district regulations for the resource recovery district. It sets the maximum height of

buildings, exclusive of stacks, at 40 feet, as compared to the maximum of 165 feet in the repealed resource recovery district regulations, and as compared to maximum height limitations of 100 to 200 feet in adjacent areas zoned for industry. This ordinance lists a resource recovery facility—*i.e.*, a refuse disposal plant—as allowable only by conditional use approval granted by the township council. One of the conditional use standards limits a resource recovery facility to a design capacity not greater than 250 tons per day, as compared to the 1200-ton daily capacity allowable under the repealed version of the resource recovery district regulations.

Ordinance No. 937 amended the zoning map to describe the resource recovery district as being 36.3 acres in area, instead of the 121 acres previously allowed, and as including only 10 acres of the county-owned 70 acres.

In addition to the foregoing ordinances, Judge BUCHER's adjudication also refers to Ordinance No. 837, subdivision and land development regulations under the MPC; section 5 of the township's Code, requiring a building permit; section 10 of the township's Code, subjecting the proposed facility to air pollution control approval; and section 23 of the township's Code, requiring a permit for connection of the facility to the East Norriton-Plymouth Joint Sewer Authority line. Although the findings of fact contain no reference to these provisions, Judge BUCHER's opinion also declared them to be invalid as applied to the county's proposed plan.

Jurisdiction

As Judge BUCHER correctly decided, the trial court had subject matter jurisdiction in these equity and declaratory judgment actions to adjudicate all of the issues which the parties presented. Only the township has attacked the court's jurisdiction and, of course, only with respect to the county's counterclaim; equity juris-

diction with respect to the township's initial action to enjoin an alleged threatened violation of its zoning is expressly confirmed by section 617 of the MPC, 53 P.S. §10617.

In analyzing the jurisdictional question, the distinction between the operational regulations and the zoning provisions immediately becomes useful.

With respect to the operational regulations at issue, consisting of the solid waste management ordinance, No 934 and the operational provisions of Ordinance No. 936, regulating how the refuse disposal plant should be technically designed and conducted with respect to capacity and other specifications, a need to exhaust zoning remedies under the MPC is clearly not present. Without any question concerning resort to zoning procedures, the courts have reviewed and negated municipal solid waste operational regulations in *Crown Wrecking Co., Inc. v. Township of Ross*, 93 Pa. Commonwealth Ct. 268, 500 A.2d 1293 (1985) (ordinance regulating the operation of landfills and the transportation of wastes), and *Municipality of Monroeville v. Chambers Development Corporation*, 88 Pa. Commonwealth Ct. 603, 491 A.2d 307 (1985) (regulating landfills as to times of operation).

In the latter case, this court made clear that the regulation of waste disposal operations "presents an issue which is qualitatively different from the question of regulating the physical location of a proposed landfill." We noted that the municipality sought to regulate the hours and days of the landfill operation, "not the physical configuration of the site, nor the land use. . . ." 88 Pa. Commonwealth Ct. at 608, 491 A.2d at 310. In other words, the operational regulations did not fall within the category of the land use controls accomplished by zoning, under the MPC.

Consistently, Judge BUCHER here held, and we agree, that zoning administration procedures could not provide relief with respect to the operational regulations on which the township here relies; the insufficiency of the administrative remedy confirms the propriety of trial court's initial jurisdiction. *Feingold v. Bell Telephone Co. of Pennsylvania*, 477 Pa. 1, 6, 383 A.2d 791, 793 (1977).

With the common pleas court initial jurisdiction being thus clearly appropriate for the operational regulations, there is no doubt that, in a case such as this one, zoning provisions—which the township has inextricably connected with the operational regulations—are, and should be, also cognizable in the same jurisdiction for adjudication. When the public welfare calls for the simultaneous adjudication of zoning provisions along with other matters, as where ordinance provisions and public contracts and projects are interrelated as in this case, the administrative process is not adequate and equity jurisdiction is appropriate to achieve a prompt and unified resolution. *Duquesne Light Co. v. Upper St. Clair Township*, 377 Pa. 323, 105 A.2d 287 (1954) (zoning questions affecting transmission line construction project, cognizable in equity). Also pertinent is *Gladwyne, Inc. v. Township of Lower Merion*, 409 Pa. 441, 187 A.2d 549 (1963) (zoning issues, related to developer's agreement with township, cognizable in equity). The exhaustion of administrative remedies is not warranted when that process would be unfeasible. *Borough of Green Tree v. Board of Property Assessment*, 459 Pa. 268, 328 A.2d 819 (1974).

Judge BUCHER also correctly determined that equity jurisdiction was appropriate in view of the futility of pursuing township approval in the face of the township's explicit and obdurate opposition, as detailed in the findings of fact, and on the basis of the irreparable harm

facing the county and the public as a consequence of the importance of the project to the general welfare of the larger community. *Duquesne Light*.

Finally, the trial court's jurisdiction was not deficient by reason of the point, newly raised by the township here, that the county's contractor and other municipalities in the district were indispensable parties whom the county has failed to join. Clearly, the presence of those parties is not necessary to the adjudication of the validity of the township's ordinances in relation to the county; certainly, Plymouth Township as a plaintiff did not join those additional parties as defendants whose interests would have to be involved in the case. The possible standing of those defendants to seek intervention on their own motion, to advance any interests shared by them with one of the original parties, does not mean that the presence of those parties is indispensable, of course.

Preemption of Township's Operational Regulations

Soundly relying upon his review of the SWMA and applicable decisions of this court dealing with the effect of that statute, Judge BUCHER ruled in the trial court here that the pervasive powers conferred by the legislature upon DER with respect to the transportation, processing, treatment and disposal of solid waste, SWMA §§102-202(b), 35 P.S. §§6018.102-6018.202(b), preempted municipal powers to govern those functions by operational regulations. As noted above, the township's operational regulations here purport to require permits for waste processing, regulate the transportation and disposal of the waste, and prescribe limits upon the design, capacity and size of waste disposal facilities. Because municipal power to regulate resource recovery facilities or disposal plants has been preempted just as certainly as local power to regulate waste disposal by means of

landfills, the trial court correctly followed this court's conclusion in *Municipality of Monroeville*, which stated:

> Given the legislature's specific, detailed provision that municipalities may regulate the 'storage' and 'collection' of solid waste, the exclusion of this 'disposal' from the definition of 'storage,' and the obvious omission of any other permitted areas, we conclude that the legislature did not intend municipalities to have the power to regulate any aspects of the operation of a sanitary landfill.

88 Pa. Commonwealth Ct. at 609, 491 A.2d at 311.

Accordingly, the trial judge noted that, "while DER is granted broad powers to promote area-wide planning and to regulate all areas of solid waste management, municipalities are responsible only for implementing their own plan and, in furtherance of this responsibility, may regulate only in the areas of storage and collection." We agree with the trial judge that there is controlling significance in the point that the SWMA recognizes municipal legislation over *waste disposal operations* only in the provision that "any such municipality may adopt ordinances, regulations and standards for the storage and collection of municipal waste. . . ." SWMA §202(b), 35 P.S. §6018.202(b).

Shortly after *Municipality of Monroeville*, this court affirmed the view that the state had preempted the field of operational regulations of waste by adopting the opinion of Judge NARICK, then of the Court of Common Pleas of Allegheny County, in *Crown Wrecking Co.*, which viewed the SWMA as unequivocally excluding the municipalities from the regulation of waste disposal—in that case also by landfill.

Accordingly, Ordinance No. 934, the township's solid waste management ordinance, has no legal effect. Similarly, the operational provisions of Ordinance No.

936, limiting the capacity, design and size of resource recovery facilities, are also of no effect. The township council's power, through the conditional use approval provision, to subject such facilities to operational, design capacity or size conditions is also rendered nugatory by the preemptive effect of the SWMA.

Preemption as to Township Zoning

Although *Municipality of Monroeville* confirms state preemption as to waste disposal operational regulations, our opinion also contains clear statements—which should not be overlooked—of this court's repeated conclusion that the present SWMA does *not* preempt local zoning provisions as such. The opinion in *Municipality of Monroeville* states:

> After the passage of the current Solid Waste Management Act, this court has continued to hold that, with respect to the location of landfill sites, the new Act does not preempt local zoning regulations. In Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township, 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982), the court (in a footnote) rejected the contention that both Acts wholly preempted the subject of solid waste management and therefore prevented the application of a local zoning ordinance to prohibit the expansion of a present, lawful landfill into an area zoned for industrial use.
>
> The court's most recent consideration of the preemption question, Sunny Farms, Ltd. v. North Codorus Township, 81 Pa. Commonwealth Ct. 371, 474 A.2d 56 (1984), involved a zoning ordinance requiring a buffer zone around a proposed hazardous waste disposal facility. We

> there noted (1) the presumption that the legislature knew the court's construction of the former act when it drafted the new legislation and (2) the specific provision of section 105(h) of the Act, 35 P.S. §6018.105(h), that a state certificate of public necessity supersedes local prohibition of hazardous waste facilities; therefore, we concluded that the local ordinance's mandate of a buffer zone was not ousted by preemption.

88 Pa. Commonwealth Ct. at 607-08, 491 A.2d at 310.[3] Thus, this court has concluded, the internal content of the SWMA quite explicitly recognizes local zoning regulations and indicates that local zoning is not preempted by the enactment of the statute itself nor by administrative implementation of it, short of issuance of a certificate of public necessity by the Environmental Quality Board, which applies only to hazardous waste facilities. Because this case does not involve *hazardous* waste disposal, the record does not indicate that the Environmental Quality Board has issued any such superseding certificate of public necessity here.

However, appropriate additional reference should be made to *Department of General Services v. Ogontz Area Neighbors' Association*, 505 Pa. 614, 483 A.2d 448 (1984), which has been addressed by the briefs of both sides. In *Ogontz*, the opinion (1) frankly recognized the difficulty of distinguishing the contrary results achieved by the "balancing" approach in *Pemberton Appeal*, 434 Pa. 249, 252 A.2d 597 (1969), as compared to *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d

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[3] Section 105(h), above mentioned, reads as follows:

(h) Issuance of a certificate of public necessity under this section shall suspend and supersede any and all local laws which would preclude or prohibit the establishment of a hazardous waste treatment or disposal facility at said site, including zoning ordinances.

607 (1976) *rev'd in part* 505 Pa. 614, 626, 483 A.2d 448, 454 (1984), (2) decried the lack of certainty and predictability inherent in the balancing approach, and (3) called for a return to statutory construction techniques, noting in particular the provision of the Statutory Construction Act, 1 Pa. C. S. §1921(c)(6), that legislative intent may be determined by considering, among other things, the consequences of a particular interpretation. With respect to local zoning powers, the Supreme Court noted that the subordination of local zoning, if uniformly followed, would frustrate local plans in every case where the plan of the Commonwealth (or other agency) conflicted with the city plan. On the other hand, the Supreme Court reasoned that recognition of local zoning powers would not necessarily frustrate a program under state law because "the loss of one location might well be compensated for by substitution of another." 505 Pa. at 628, 483 A.2d at 455.

Although that view, that local zoning and a state program could coexist, permitted the Supreme Court, in *Ogontz*, to uphold the locational decision pattern of the city under its zoning ordinance, the SWMA in this case introduces a complicating factor which must be considered, those provisions of SWMA section 201, 35 P.S. §6018.201, that expressly, and with apparent forethought, contemplate municipal participation, along with other municipalities and the county, in the formulation of comprehensive plans for waste management which will include the land planning decisions affecting location.

That section evinces an orderly and sensible scheme.[4] Municipalities have the initiative in generat-

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[4] Section 201, of the SWMA, 35 P.S. §6018.201, confers upon municipalities extensive planning powers and duties as to solid waste. Under subsection (b), the municipality must submit to DER an officially adopted plan for a municipal waste management system. The municipality may request the county in which it is located

ing waste management plans and are encouraged to integrate that planning with the land planning programs of their own municipality, adjacent municipalities and the county. Because ready agreement among numerous parties cannot be automatically assured in such joint planning efforts, SWMA section 201 gives DER a referee-like power to approve or disapprove plans overall,

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to perform that function, or, where more than one municipality is involved, they may act jointly or through action of the county with the concurrence of the affected municipalities. Subsection (d) states that every plan "shall delineate areas where municipal waste management systems are in existence" as well as "areas where the municipal waste management systems are planned to be available within a ten-year period." Legislative intention to keep the municipal zoning power alive with respect to municipal waste management system planning is indicated by subsection (e)(2), which specifies that:

> (e) Every plan shall:
>
> . . . .
>
> (2) take into consideration all aspects of planning, *zoning*, population estimates, engineering and economics so as to delineate with precision those portions of the area which may reasonably be expected to be served by a municipal waste management system within ten years of the submission of a plan. . . . (Emphasis added.)

Subsection (f) expressly contemplates that the plan "shall be reviewed by appropriate official planning agencies within a municipality," as well as area-wide planning agencies and county planning agencies "for consistency with programs of planning if one exists. . . ."

With the statute thus indicating that municipal waste management system plans include, but are not limited to, locational matters affected by zoning and planning, subsection (g) expressly authorizes the department "to approve or disapprove plans for municipal waste management systems" submitted in accordance with the Act. In addition, subsection (h) authorizes DER to approve or disapprove revisions of plans and subsection (1) authorizes the department to order, or obtain injunctions requiring, municipalities to implement the plans which they have submitted.

and the power to enforce them when implementation is necessary.

Under the present record, the township's repealed zoning ordinance apparently was in accordance with a joint plan which has been in process. Even the present zoning map designation in Ordinance No. 637 remains applicable to part, but only part, of the county land which marked the location of the facility as contemplated.

Although the SWMA evinces an intention to recognize local zoning power when it is used in an integrated fashion (and when not superseded by a certificate of public necessity as to hazardous waste disposal), that affirmation of local zoning power provides no guarantee that the revised present zoning approach of the township is specifically valid under the principles governing legal zoning.

Zoning Ordinance Validity

The trial judge here found the zoning provisions invalid, along with the operational regulations, by reason of preemption. Because our pursuance of the Supreme Court's *Ogontz* principles and our own precedents bars a conclusion that the zoning provisions here are negated by preemption, we turn to consider whether we must nevertheless affirm the trial judge's invalidation of the zoning provisions on other grounds, as we may do if the law so requires. *E. J. McAleer & Co. v. Iceland Products, Inc.*, 475 Pa. 610, 613, n. 4, 381 A.2d 441, 443, n. 4 (1977); *Department of Public Welfare v. Dauphin County Social Services for Children and Youth*, 90 Pa. Commonwealth Ct. 295, 495 A.2d 214, 216 (1985).

Of particular note here is the trial judge's statement, virtually a finding of fact, indicating that the township

did not adopt these zoning provisions for legitimate land planning purposes. The trial judge said:

> The circumstances surrounding the passage of the ordinances and the limitations which they impose indicate to the court that ordinances No. 934, 936, 937 were designed and enacted by Council to exclude the proposed facility from the Township and to restrict and regulate the operations of any facility that will eventually be constructed.

The trial court took particular note that the council chairperson admitted that the goal was to stop the county resource recovery facility if possible.

So perceived, the unavoidable conclusion is that the zoning provisions in this case are classic examples of spot zoning—zoning provisions adopted to control the use of a specific area of land without regard to the relationship of those land use controls to the overall plan and the general welfare of the community.

Judge COLINS of this court has articulated the true nature of spot zoning in *Pace Resources v. Shrewsbury Township Planning Commission*, 89 Pa. Commonwealth Ct. 468, 492 A.2d 818 (1985), pointing out that, properly understood, it is more than just discriminatory or "island" zoning—the land area involved being only one of the determining factors—in that:

> Futhermore, our Supreme Court has cautioned us that we should not limit our inquiry to the mere physical aspect and characteristics of the land, but we should also consider how the rezoning affects the public health, safety, morals, and general welfare and how it relates to the township's comprehensive plan. Shubach, 461 Pa. at 382-83 n. 14, 336 A.2d at 336 n. 14.

The key point is that when a municipal governing body puts on blinders and confines its vision to just one isolated place or problem within the community, dis-

regarding a community-wide perspective, that body is not engaged in lawful zoning, which necessarily requires that the picture of the whole community be kept in mind while dividing it into compatibly related zones by ordinance enactments. In other words, legislating as to a *spot* is the antithesis of *zoning*, which necessarily functions within a community-wide framework. The MPC's basic zoning authorization, in section 601, 53 P.S. §10601, describes the very purpose of zoning ordinances as being "to implement comprehensive plans and to accomplish any of the purposes of this act." Those purposes, spelled out in section 105 of the MPC, 53 P.S. §10105, include the following:

> To protect and promote safety, health and morals; and
>
> To accomplish a coordinated development of municipalities.

Nothing in the MPC mandates the adoption of a specific written master plan or comprehensive plan as a separate document. Those sections 601 and 105, together with the mandate that zoning ordinances contain a statement of community development objectives, MPC §606, 53 P.S. §10606, clearly require that zoning, to be valid, must be in accordance with a rational and well considered approach to promoting safety, health and morals and a coordinated development of the whole municipality. The classic statement of the same principle is in Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 155 (1955), in which Professor Haar pointed out that the essence of sound zoning—as distinguished from spot zoning—is zoning enacted on a comprehensive and well considered basis.

As against this test, and in light of the trial court's findings of fact, Plymouth Township's purported zoning provisions in this case are not valid under the MPC. Although zoning amendment ordinances 936 and 937 did not technically amend the repealed zoning provisions

which had established a resource recovery district in accordance with the county's waste disposal plan, their actual effect and legal impact is precisely the same as if Nos. 936 and 937 had amended the zoning ordinance to (1) shrink the 121-acre district, embracing all of the county's seventy acres, down to a 36-acre district, (2) impose prohibitive requirements within that shrunken district, and (3) rezone 60 of the county's 70 acres into industrial district classifications not permitting waste disposal facilities at all.

In view of the invalidity of that zoning pattern accomplished by Ordinances Nos. 936 and 937, those ordinances, as well as Ordinance No. 934, were properly held to be invalid by the trial judge.

General Land Development and Building Permit Regulations

Although Plymouth's air pollution control, section 10 of its Code, logically also falls within the scope of operational matters preempted, nothing in this record and no principles of law support the invalidation of Plymouth Township's Subdivision and Land Development Ordinance No. 837, its building permit requirements under its building code, or its sewer connection procedures (Code §23), even as applied to the county's project. When operational regulations and zoning provisions have been ruled invalid with respect to a particular project or development, our decisions have not held that the project proponent is also free from valid procedural and permit regulations which apply to all development. Classically, the Supreme Court, when invalidating zoning provisions, has mandated that the requested land use shall be allowed, subject to lawful building procedures and regulations of the municipality which are applicable. *See Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974).

For example, Subdivision and Land Development Ordinance No. 837 rests upon article V of the MPC,

which empowers municipalities to provide assurance that particular land developments shall be properly incorporated into the overall facilities of the municipality—including its road patterns—in accordance with concerns affecting the health, safety and general welfare.

Plymouth Township doubtless is well aware that the applicability of these general regulations and procedures to the county waste disposal development in no way enables the township to abuse those procedures or use them to effectuate obdurate obstruction. *Raum v. Tredyffrin Township Board of Supervisors*, 29 Pa. Commonwealth Ct. 9, 370 A.2d 777 (1977).

Relief

The relief to be afforded the county is governed by MPC §1011(2), 53 P.S. §11011(2), as well as by those classic principles of zoning relief in Pennsylvania which are concerned with providing a remedy which is effective but not excessive.

Section 1011(2) provides that, if a court finds development restrictions to be unlawful, the court may "order the described development or use approved as to all elements," or may "order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction. . . ." In this case, that approach calls upon the trial court to bar township interference with the development and operation of the resource recovery facility on the planned site by the county, but with a recognition that the township, in view of its responsibility to citizens and their property outside that site, may apply its established subdivision and land development regulations, and sewer connection requirements, with respect to the physical relationship of the county's site as to the roads, sewers and other land outside it.

Conclusion

Accordingly, the trial court's order in the declaratory judgment case, on appeal here at No. 3313 C.D. 1986, will be affirmed insofar as it declares and adjudges Plymouth Township Ordinances Nos. 934, 936 and 937 to be invalid and unenforceable, and also adjudges section 10 of the Plymouth Township Code to be unenforceable with respect to the county project involved in this case. That order will be modified to declare that the Solid Waste Management Act has preempted the field as to the regulation of transportation, processing and disposal of municipal waste, but not as to lawful zoning concerning the location thereof; it must be reversed to the extent that it declares sections 5 and 23 of the Plymouth Township Code to be unenforceable.

The trial court's order in the equity case, on appeal here at No. 3312 of 1986, is affirmed as stated, except that the injunction shall also not prevent the lawful application by Plymouth Township to the county and its contractors of the requirements of Plymouth Township Ordinance No. 837 and sections 5 and 23 of the Plymouth Township Code.

Finally, Plymouth Township's motion to reconsider President Judge CRUMLISH's earlier order denying the township's request to remand the case to the trial court for taking additional evidence, will be denied. The township proposed to offer additional evidence on the factual question of whether or not a "trash crisis" exists in the region involved, as that factual point might relate to the matter of preemption. However, as the foregoing analysis illustrates, a conclusion as to preemption turns primarily upon the resolution of a question of law, derived from statutory interpretation.

Judge MACPHAIL concurs in the result only.

TOWNSHIP OF PLYMOUTH, Appellant	)	IN THE COMMONWEALTH COURT OF
v.	)	PENNSYLVANIA
COUNTY OF MONTGOMERY, Appellee	)	NO. 3312 C.D. 1986

ORDER

NOW, September 8, 1987, the order of the Court of Common Pleas of Montgomery County dated October 29, 1986 affirming and incorporating decree nisi dated August 12, 1986 is hereby affirmed as stated in paragraphs 1 and 2 of the decree nisi, except that Plymouth Township is not enjoined from lawfully applying the requirements of Plymouth Township Ordinance No. 837 and sections 5 and 23 of the Plymouth Township Code to Montgomery County and its contractors with respect to the project involved in this case.

Plymouth Township's motion for reconsideration of this court's order of June 8, 1987, denying the township's motion to remand to the trial court for the taking of additional evidence, is hereby denied.

/s/ David W. Craig
DAVID W. CRAIG, Judge

TOWNSHIP OF PLYMOUTH, Appellant	)	IN THE COMMONWEALTH COURT OF
v.	)	PENNSYLVANIA
COUNTY OF MONTGOMERY, Appellee	)	NO. 3313 C.D. 1986

ORDER

NOW, September 8, 1987, the order of the Court of Common Pleas of Montgomery County, dated October 29, 1986, affirming and incorporating declaratory judgment order of August 12, 1986, is hereby affirmed insofar as it declares and adjudges Plymouth Township Ordinances Nos. 934, 936 and 937 to be unenforceable by reason of invalidity and also insofar as it declares and adjudges section 10 of the Plymouth Township Code to be unenforceable with respect to the county project involved in this case; the order provisions as to preemption are modified to declare that the Solid Waste Management Act has preempted the field regulating the transportation, processing and disposal of municipal waste, but not as to lawful zoning concerning the location of plants and buildings for such purposes; and the provisions declaring sections 5 and 23 of the Plymouth Township Code to be unenforceable are reversed.

Plymouth Township's motion for reconsideration of this court's order of June 8, 1987, denying the township's motion to remand to the trial court for the taking of additional evidence, is hereby denied.

/s/ David W. Craig
DAVID W. CRAIG, Judge

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

TOWNSHIP OF PLYMOUTH	)	NO. 85-19292
vs.	)	IN EQUITY
COUNTY OF MONTGOMERY	)	

TOWNSHIP OF PLYMOUTH	)	NO. 85-19293
vs.	)	DECLARATORY
COUNTY OF MONTGOMERY	)	JUDGMENT

August 12, 1986 ADJUDICATION

BUCHER, J.

Plymouth Township seeks to enjoin Montgomery County from proceeding with plans to construct a 1,200 tons per day resource recovery facility on County owned land in Plymouth Township. The Township also seeks a declaratory judgment that the proposed facility violates its zoning and other permitting ordinances.

On December 11, 1985, Plymouth Township ("Township") filed two separate actions against Montgomery County ("County"). In No. 85-19292, filed in equity, the Township seeks to enjoin the County from taking any further action to effectuate construction of the County's proposed 1,200 tons per day capacity resource recovery facility, claiming that such construction would violate Township zoning ordinances. In No. 85-19293, the Township seeks a declaratory judgment that the proposed facility violates its permitting ordinances. On December 11, 1985 the Township also filed a Motion for a Temporary Re-

straining Order, which was denied by the Honorable S. Gerald Corso on December 12, 1985.

On January 8, 1986, the County filed an Answer and New Matter to the Complaint for Declaratory Judgment and an Answer, New Matter and Counterclaim to the Complaint in Equity. The County requests the court to declare that the Township ordinances have been preempted by the Pennsylvania Solid Waste Management Act; that the ordinances are unlawful and unenforceable; and to enjoin Plymouth Township from taking any actions under the ordinances to block the construction and operation of the proposed resource recovery facility.

The Township then filed Preliminary Objections to the Answers, New Matter and Counterclaim which the Court denied by Order dated March 20, 1986. By this time, the parties had stipulated to the consolidation of the two cases. The Township filed its Reply to the County's Answers, New Matter, and Counterclaim on April 11, 1986. On April 30, 1986, the parties entered into a Stipulation agreeing that the evidence at trial would be limited to the issue of preemption. The Stipulation was approved by the court on May 1, 1986. Thereafter, the trial commenced on May 6, 1986, at which time the parties agreed to also present evidence on the issue of jurisdiction.

ISSUES

1. Whether or not the court may exercise jurisdiction to determine the validity of the Township's ordinances when the County did not exhaust administrative remedies under the Pennsylvania Municipalities Planning Code.

2. Whether or not the Solid Waste Management Act preempts Plymouth Township from regulating the transportation, processing and disposal of solid waste.

FINDINGS OF FACT

The following proposed findings of fact submitted by the parties are supported by clear and substantiating evidence and are therefore adopted by the court and incorporated herein by reference. *As to the County*—all of the County's proposed findings of fact *except* nos. 19, 20, 21, 22 and 60. (attached and incorporated herein as Exhibit "A"). *As to the Township*—nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 22, 23, 24, 29, 33 (subject to qualifications created by case law), 34 and 35 (subject to qualifications created by case law) (attached and incorporated herein as Exhibit "B")

DISCUSSION

The first issue to be resolved is whether or not the court has the jurisdiction to determine the validity of the Township's ordinances despite the fact that the County did not exhaust its administrative remedies under the Pennsylvania Municipalities Planning Code.

I. Jurisdiction

The Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, 53 P.S. § 10101, et seq. (the "Code"), sets forth the procedures municipalities must follow to enact and to amend zoning ordinances. The Code also sets forth the procedures a landowner must follow to challenge the validity of a zoning ordinance. 53 P.S. § 11004(1) provides:

> (1) A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts

> the use or development of land in which he has an interest shall submit the challenge either:
>
> (a) To the zoning hearing board for a report thereon under Section 910 or 913.1; or
>
> (b) To the governing body together with a request for a curative amendment under section 609.1.

53 P.S. § 11004(1)(a) and (b)

The Code outlines the procedures to be followed to insure that a proper hearing is held. The proceedings set forth in the Code constitute the exclusive mode for securing review of any ordinance. 53 P.S. § 11001. It is undisputed that the County did not follow the procedures mandated by the Code to challenge the validity of the township's disputed ordinances. The general rule under such circumstances is that administrative remedies must be exhuasted before a court will hear an appeal challenging the validity of an ordinance. See *Appeal of Merlino*, 19 Pa. Commw. Ct. 143, 339 A.2d 642 (1975); *Fretz v. Hilltown Twp. Board of Supervisors*, 22 Pa. Commw. Ct. 276, 348 A.2d 488 (1975).

The courts of this Commonwealth, however, have established three exceptions to the exhaustion doctrine: first, exhaustion is not required where resort to the remedy would be futile; *Baker v. Com. Pa. Human Relations Commission*, 75 Pa. Commw. Ct. 296, 462 A.2d 881 (1983); *Heaseley v. Operative Plasterers and Cement Finishers International Association*, 324 Pa. 257, 188 A. 206 (1936); *Blenko v. Schmeltz*, 362 Pa. 365, 67 A.2d 99 (1949); second, exhaustion is not required where the administrative remedy is inadequate and incomplete; *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1978); *Gladwyne*

Colony, Inc. v. Township of Lower Merion, 409 Pa. 441, 187 A.2d 549 (1963); and third, exhaustion is not required where the public would suffer irreparable harm during the pendency of the administrative proceeding; *Duquesne Light Co. v. Upper St. Clair Twp.,* 377 Pa. 323, 105 A.2d 287 (1954); *Wood v. Goldvarg,* 365 Pa. 92, 74 A.2d 100 (1950).

A. Futility

The County asserts that the Township Council's bias, prejudice and pre-determination against the County's plan would render any attempt by the County to adhere to the administrative remedies futile. We agree.

The County presented extensive evidence at trial to support the claim of bias. The record reveals the following facts: in February, 1985, the Montgomery County Solid Waste Management Committee was preparing for a Request for Proposals for a 1,200 tons per day joint facility for Solid Waste Districts 1 and 2. Mr. Wurzbach, Chairman of Plymouth Township Council, participated in these discussions and was in favor of such a facility. (N.T. 102-103). The Township Solicitor formally confirmed Mr. Wurzbach's favorable position by letter dated February 13, 1985 to the County Solicitor stating, in part, that Mr. Wurzbach "saw no problem with sizing the incinerator permitted to a tonnage sufficient to accommodate those communities in Regions 1 and 2 . . ." (N.T. 147, Exhibit D-7). On April 15, 1985, the Township adopted an amendment to its zoning ordinance which permitted the proposed 1,200 tons per day facility to be constructed on County owned land in the township. (Exhibits D-10, D-9).

Throughout the course of the planning there was constant local political pressure in opposition to the proposed facility. (N.T. 285). After the passage of the April 15th ordinance, the political activity taking place in the township was considerable and included the formation of a citizens group in opposition to the facility. (N.T. 40-41). The biggest and most volatile issue of the upcoming primary election for Plymouth Township Council was the issue of the proposed resource recovery facility. (N.T. 286). On April 29, 1985, only two weeks after the 1,200 tons per day ordinance was enacted and one week before the primary election, Council repealed the 1,200 tons per day ordinance by a unanimous vote. (Exhibit D-11).

At the time the 1,200 tons per day ordinance was repealed, a prepared statement was read by Councilman Washeleski, drafted by himself and Robert Wurzbach, which began with the sentence: "Plymouth Township is unanimously opposed to permitting any type of solid waste disposal facility within our township." (Exhibit D-11). The statement was later signed by all members of the Township Council except one and published as a letter to the editor in the May 29, 1985 edition of *Today's Post*. (Exhibit D-12). Although the Township contended that the 1,200 tons per day ordinance had been repealed for effective advertising, the ordinance was never readvertised. (N.T. 277-278). Soon after the repeal, Mr. Wurzbach notified the County that the readoption of the 1,200 tons per day ordinance was "probably a dead issue", (N.T. 130), and that Council "wouldn't be able to approve a twelve to fifteen hundred ton a day facility." (N.T. 279).

On July 8, 1985, Council passed Ordinance No. 936, which dramatically revised the 1,200 tons per day ordi-

nance. The design capacity of the proposed facility was restricted to 250 tons per day and the height (exclusive of stacks) was restricted to 40 feet. Ordinance No. 936 was adopted despite legal advice from the township solicitor questioning the validity of its restrictions. (Exhibit D-13, D-15).

Since the passage of Ordinance No. 936 the Township has repeatedly reconfirmed its opposition to the proposed facility. On November 27, 1985, the Township Solicitor wrote a letter to Paul B. Bartle, Chairman of the County Commissioners, advising that "the construction of such a facility will not be permitted unless and until a court rules to the contrary." (Exhibit P-3). On December 9, 1985, the Township Council unanimously directed its solicitor to file these actions against the County in an effort to prevent the construction of the resource recovery facility. (N.T. 192). As recently as March 28, 1986, the Township Solicitor wrote a letter to the Project Director at Dravo Energy Resources, Inc. warning that the construction of this facility is "illegal" and will not be given a permit "unless the Court, in current litigation, rules that the Township Zoning Ordinance is illegal and/or invalid." (Exhibit D-29).

These facts reveal that the Township Council was staunchly opposed to a 1,200 tons per day resource recovery facility as proposed by the County and was determined to defeat the County's plan. It is clear to the Court that any attempt by the County to pursue the administrative remedies prescribed by the Municipalities Planning Code would have been an exercise in futility.

The issue of bias in a decision-making body was recently addressed by the Pennsylvania Commonwealth

Court in *McVay v. Zoning Hearing Board*, — Pa. Commw. Ct. —, 496 A.2d 1328 (1985), which involved an appeal by a landowner from a zoning hearing board decision. In *McVay*, a majority of the members of the zoning hearing board, prior to being appointed to that board, had signed and filed petitions in opposition to the adoption of a zoning ordinance amendment to rezone property for a low cost housing project. Upon appointment to the board three months later these same individuals denied petitioner's request for a special exception to the zoning ordinance. Petitioner then appealed to the Court of Common Pleas, which vacated the board decision as void for bias. The Commonwealth Court agreed:

> This Court has no hesitancy in agreeing with Judge Wiser that the board decision was void in view of the majority's previous participation in a signed project. Even without proof of harm, Pennsylvania's Supreme Court has concluded that a denial of due process is present in such situations.

McVay v. Zoning Hearing Board, — Pa. Commw. Ct. at —, 496 A.2d at 1330.

The *McVay* court quoted language from earlier Pennsylvania Supreme Court cases:

> [A]ny tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.

McVay v. Zoning Hearing Board, — Pa. Commw. Ct. at —, 496 A.2d at 1330, quoting *Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969). See also: *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975).

The principles articulated in *McVay* apply with equal force in the instant matter. Under the Municipalities Planning Code, the administrative remedies available to the County were to submit a challenge to either the zoning hearing board for a report, or to the Township Council requesting a curative amendment. 53 P.S. § 11004(1)(a) and (b). The evidence clearly established that the pervasive bias among members of Council against the County plan would have rendered any attempt by the County to receive a curative amendment futile. Furthermore, in view of the intense political climate surrounding Council's repeal of the 1,200 tons per day ordinance and the enactment of Ordinance No. 936, it is difficult to imagine that the members of the zoning hearing board, who are appointed by council to their positions[1], could remain unbiased and objective under such circumstances. To require the County to pursue administrative remedies before biased tribunals merely to meet the requirements of the Municipalities Planning Code would result in an exercise in futility. As the court articulated in *McVay*, a determination rendered under such circumstances would be void for bias.

B. Inadequate and Incomplete Relief

The second exception to the exhaustion doctrine is that exhaustion is not required if the administrative remedy is inadequate and incomplete. *Feingold v. Bell of Pennsylvania, supra; Gladwyne Colony, Inc. v. Township of Lower Merion, supra; Duquesne Light Co. v. Upper St. Clair Twp., supra.*

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1. 53 P.S. § 10903.

In *Feingold v. Bell of Pennsylvania, supra,* a private litigant's complaint seeking legal and equitable relief and damages from the telephone company was dismissed for the plaintiff's failure to exhaust administrative remedies under the Public Utility Law[2] before seeking a judicial remedy. The Pennsylvania Supreme Court reversed and vacated the lower court's decree. Initially, the court noted that "[a]s with all legal rules, the exhaustion of administrative remedies rule is neither inflexible nor absolute. . .," *Id.,* 477 Pa. at 6, 383 A.2d at 793, and that "[t]he mere existence of a remedy does not dispose of the question of its adequacy; the administrative remedy must be 'adequate and complete'." *Id.,* 477 Pa. at 7, 383 A.2d at 794, quoting *Philadelphia Life Insurance Co. v. Commonwealth,* 410 Pa. 571, 190 A.2d 111 (1963). The Court then reviewed the statute and found that, although the PUC possessed formidable statutory enforcement and remedial powers, the PUC did not have the power to grant the relief sought by Petitioner; that is, the PUC could not award damages to a private litigant for breach of contract by a public utility. Thus, the administrative remedy was not adequate and complete since the petitioner could not be made whole by the PUC. The Court explained:

> The rule requiring exhaustion of administrative remedies is not intended to set up a procedural obstacle to recovery; the rule should be applied only where the available administrative remedies are adequate with respect to the alleged injury sustained and the relief requested. (footnote and citation omitted).

Id., 477 Pa. at 10, 383 A.2d at 795-796.

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2. Act of May 28, 1937, P.L. 1053, 66 P.S. § 1101 et seq.

The same conclusion was reached in an earlier Pennsylvania Supreme Court decision. In *Gladwyne Colony, Inc. v. Township of Lower Merion, supra*, plaintiffs brought an action in equity to invalidate a rezoning ordinance and a separate agreement whereby the township approved the construction of an apartment complex in exchange for the dedication of certain private land for use as a public park. The Supreme Court found no wrongdoing on the part of the township and therefore affirmed the dismissal of the complaint; however, the court expressly over-ruled the lower court's finding that the plaintiff could not test the validity of the ordinance in an equity action. As the court stated:

> We differ with the lower court's views in one respect. There is no merit in the defendant's contention that the plaintiffs could not test the validity of the ordinance in this equity action. The remedy at law would not have been an adequate one here, since the plaintiff's were attacking not only the propriety of the ordinance but the agreement and the actions taken under it as well. The ordinance was being questioned as part of the entire transaction.

Id., 409 Pa. at 447, 187 A.2d at 552.

The holdings of *Feingold* and *Gladwyne* apply with equal force to the instant matter. The relief the County seeks is the invalidation of Ordinances Nos. 934, 936 and 937 insofar as the ordinances regulate areas preempted by the Pennsylvania Solid Waste Management Act. Neither the Township Council nor the zoning hearing board are granted the power under the Code to make such a determination. Under the Code, the function of either the Council or the board in a zoning appeal is to

act as fact-finder. 53 P.S. § 10908(9). An appeal to Council could produce, at best, a curative amendment. 53 P.S. § 11004(1)(b); 53 P.S. § 10609.1. On appeal, the zoning hearing board will issue findings of fact and a report. 53 P.S. § 11004(1)(a); 53 P.S. § 10910. The power to declare an ordinance invalid, however, is expressly granted to the courts. 53 P.S. § 11011(1).

The administrative remedies under the Municipalities Planning Code do not provide the County with adequate and complete relief, as neither the Council nor the board is granted the power to determine, as a matter of law, that an ordinance is invalid by preemption. Exhaustion of administrative remedies, therefore, is not required.

C. Irreparable Harm

The third exception to the exhaustion doctrine is that exhaustion will not be required where the pursuit of the administrative remedy will work an irreparable harm on the party seeking to challenge the zoning ordinance.

In *Duquesne Light Co. v. Upper St. Clair Twp., supra,* a public utility corporation brought suit in equity to enjoin the township of Upper St. Clair from enforcing a zoning ordinance against its proposed construction of a new transmission line. The utility contended that the local zoning law was preempted by state statute (the Public Utility Code). The township argued that the court could not exercise jurisdiction because the zoning statute under which its ordinance was adopted provided the exclusive remedy for relief by way of a hearing before the Board of Adjustment; Duquesne, however, had not pursued this remedy. Finding that both the public and the

utility would suffer irreparable harm during the pendency of an administrative proceeding, the Supreme Court of Pennsylvania held that exhaustion was not required. The following language from the court's opinion is instructive:

> The evidence was undenied that unless construction of the transmission line were resumed by March 15, 1954. Duquesne would be unable to complete it by September 1, 1954, the day on which the third generator now being built at Elrama is expected to be put into service. There was likewise uncontradicted evidence that if the transmission line is not completed by September 1, 1954, Duquesne will be forced under various conditions to use less efficient equipment or to curtail service to its customers, at a cost or loss to it of from $150 per day to $350 per hour. Under the administrative procedure provided by Section 3107 of the zoning statute of June 24, 1931, P.L. 1206, as amended, 53 P.S. § 19092-3107, the Board of Adjustment fixes a reasonable time for the hearing of an appeal, must give public notice thereof as well as due notice to the parties in interest and decide the same within a reasonable time, and any party aggrieved by the Board's decision has 30 days in which to appeal to the county court. Patently such time-consuming procedure would cause Duquesne irreparable financial harm, without taking into consideration the interests of the public.

Duquesne Light Co. v. Upper St. Clair Twp., 377 Pa. at 339-340, 105 A.2d at 294-295.

As in *Duquesne*, the County and its citizens will be faced with irreparable harm if the County is forced to pursue time-consuming administrative remedies which delay the construction of the proposed facility. Mr. Richard N. Koch, an expert in the field of municipal solid waste

planning, testified to the existence and gravity of the solid waste disposal crisis which confronts Pennsylvania as a whole and the County in particular. The court found this testimony to be credible.

Mr. Koch testified that in the past, nearly all of the County's municipal waste was disposed of by landfilling. (N.T. 41, 42). Presently, however, the number of landfill facilities has decreased and, more importantly, the availability of those landfills for disposal practices has been severely limited. (N.T. 45-46). With the closing of the County landfill on December 31, 1985, (N.T. 43, 112-113), only one landfill permitted in Montgomery County is available to take the County's waste; however, its availability is limited by the terms of the contract and it will remain available for only two or three years more. (N.T. 47). None of the landfills that exist outside the County could take all of the County's trash (N.T. 47); nor would they be available to the County after two or three years. (N.T. 48-49).

Presently, the amount of refuse being generated in eastern Pennsylvania is outstripping the disposal capacity. (N.T. 28). Solid Waste Districts 1 and 2, the areas to be serviced by the proposed facility, are the most densely populated areas of the County, generating 2/3 of all the County's waste. (N.T. 51). In an effort to find adequate disposal, refuse is being hauled further and further away from the areas in which it was generated. (N.T. 28). Mr. Koch testified that hauling trash over long distances is not good solid waste management practice because: 1) it is accomplished pursuant to short-term contracts; 2) it reduces available disposal space for those living in the areas dependent on that particular landfill

for waste disposal; and 3) it is not cost-effective. (N.T. 49-50). Despite this obvious need to develop a long-term solution to the County's waste disposal needs, no new facilities are being developed in eastern Pennsylvania except the resource recovery facility which is the subject of this litigation. (N.T. 28). Clearly, a solid waste management crisis does in fact exist in eastern Pennsylvania.[3] (N.T. 28).

Unless construction of the proposed resource recovery facility is promptly commenced, the County faces an irreparable harm which is double-edged. The construction of the facility is projected to take thirty-three months. (N.T. 49, Stipulation Paragraph 6). This projection is predicated upon starting construction in the fall of 1986. (N.T. 49). Based on these projections, the facility would be available for disposal operations in mid-1989. As Mr. Koch testified, however, landfill areas currently available to the County will be filled to capacity within two to three years. Therefore, unless the County commences construction on the facility within the projected starting deadlines, the citizens of Montgomery County living in Districts 1 and 2 will be without a viable long-term option for disposing of solid waste just as landfills in the area reach capacity levels. Considering that 2/3 of the County's waste is generated in Districts 1 and 2, the consequences of this result could prove disastrous.

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3. The township has acknowledged the seriousness of the problem. In a letter dated November 2, 1984 to Paul B. Bartle, Chairman of the Montgomery County Commissioners, Robert Wurzbach, writing in his official capacity as Chairman of Plymouth Township Council, wrote that Council recognized the "serious solid waste disposal problem in the region." (Exhibit D-6).

Furthermore, failure to commence the proposed facility promptly will result in a tremendous financial loss to the citizens of Montgomery County. To finance the cost of construction of the resource recovery facility, the County Industrial Development Authority issued tax-exempt bonds in the face amount of $107,000,000. (N.T. 9, 190, Exhibit D-25). It is undisputed that if the project is not commenced in a prompt manner, it stands to lose tax-exempt financing and the taxpayers of Montgomery County will be subjected to a forfeiture of up to $2,500,000. (N.T. 196).

The evidence clearly establishes that under the circumstances of this case time is of the essence in resolving the issues raised in this action. The appeal process under the Municipalities Planning Code, however, is time-consuming. After the ordinance takes effect, a landowner may request a hearing before either the zoning hearing board or Council. 53 P.S. § 11004(2)(a) and (b). After the request is filed, the hearing must be held within sixty (60) days. 53 P.S. § 11004(2)(f). Thereafter, a decision must be entered within forty-five (45) days after the hearing is held. 53 P.S. § 10908(9). The circumstances of this case are similar in effect to those in *Duquesne*. The pursuit of such a time-consuming remedy would result in irreparable harm to the County and its citizens. Therefore, the exhaustion of administrative remedies is not required, and jurisdiction may be exercised by the court.

Having thus determined that this court has the jurisdiction to hear this matter, we now turn to the issue of preemption.

II. Preemption

The County contends that the Solid Waste Management Act [the "Act"] preempts Plymouth Township from enacting ordinances which regulate the operation of solid waste disposal facilities. Upon review of the statute and the relevant case law, it is clear to this court that the State has preempted this field; therefore, Plymouth Township's Ordinances Nos. 934, 936 and 937 are invalid inasmuch as they regulate the operation of the proposed resource recovery facility.

The Pennsylvania legislature has determined that improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare. 35 P.S. § 6018.102. The purpose of the Act is, *inter alia*, to provide the mechanism for the establishment, maintenance, and implementation of comprehensive solid waste management planning on both the State and local levels. 35 P.S. § 6018.102.

The powers and duties of the participating governmental entities are clearly defined by the Act. The Department of Environmental Resources ["DER"] is granted the power to administer the solid waste management program and to develop a statewide solid waste management plan emphasizing area-wide planning. 35 P.S. § 6018.104 (1) and (3). DER is specifically empowered to regulate the storage, collection, transportation, processing, treatment and disposal of solid waste. 35 P.S. § 6018.104(6). DER is further empowered to issue permits and licenses, to specify the terms and conditions thereof, and to require the payment of fees for the processing of any permit or

license application. 35 P.S. § 6018.104(7) and (8). It is DER who is authorized to approve or disapprove plans for municipal waste management systems. 35 P.S. §6018.201(g).

The powers and duties of municipalities are also clearly defined under the Act. Each municipality must submit to DER an officially adopted plan for a municipal waste management system or must request the County in which the municipality is located to perform this function on its behalf. 35 P.S. § 6018.201(b) Each municipality is also responsible for the collection, transportation, processing, and disposal of municipal waste which is generated or present within its boundaries and for implementing its approved plan. 35 P.S. § 6018.202(a). In carrying out its responsibilities, municipalities are given regulatory powers in two limited and specifically defined instances: ". . . any such municipality may adopt ordinances, regulations and standards for the *storage*[4] and *collection*[5] of municipal waste . . ." 35 P.S. § 6018.202(b) (emphasis added). Thus, while DER is granted broad powers to promote area-wide planning and to regulate all areas of solid waste management, municipalities are responsible only for implementing their own plan and, in furtherance

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4. "Storage" is defined as the "containment of any waste on a temporary basis in such a manner as not to constitute disposal of such waste." 35 P.S. § 6018.104. "Disposal" is defined as the "incineration, deposition, injection, dumping, spilling, leaking or placing" solid waste into the environment. 35 P.S. § 6018.104.

5. "Collection" is defined by Webster's Third New International Dictionary (1976 edition) as "the act of collecting" and "collect" as "gather".

of this responsibility, may regulate only in the areas of storage and collection.

Pursant to the regulatory powers granted under the Act, DER has promulgated establishing standards for certain aspects of solid waste management. All solid waste disposal facilities must comply with environmental, operational and engineering standards established by DER. 25 Pa. Code § 75.21. DER has established general standards for the storage of solid waste, 25 Pa. Code § 75.28; standards for the collection and transportation of solid waste, 25 Pa.Code § 75.29; and standards for solid waste incinerator facilities, 25 Pa.Code § 75.30. Thus, a review of the Act and the pertinent regulations promulgated thereunder makes clear that the legislature intended to empower DER with broad, regulatory powers to over-see the implementation and maintenance of a comprehensive, area-wide solid waste management program operating within the Commonwealth; therefore, local municipalities are preempted from regulating in this field.

This conclusion is well-supported by case law. In *Crown Wrecking Co., Inc. v. Township of Ross,* (C.P. Allegheny Co. 1984), affirmed — Pa.Commw.Ct. —, 500 A.2d 1293 (1985), the operator of a solid waste landfill filed a Complaint in Equity seeking an Order declaring invalid the township's ordinance which regulated the operation of solid waste landfills and the transportation of waste. Crown contended that the regulation of solid waste landfills was preempted by the State through the Department of Environmental Resources under the authority of the Solid Waste Management Act; therefore, the ordinance was invalid *per se* because it regulated an area specifically preempted by the Commonwealth.

In an opinion characterized by the Commonwealth Court as "able" and "well-reasoned", the Honorable Emil E. Narick of the Court of Common Pleas of Allegheny County held that "the State had preempted the field regulating the conduct and operation of landfills throughout the Commonwealth . . .". Lower court slip opinion at page 5. As the Court stated:

> The Act and the DER regulations manifest the legislative intention to exclusively occupy the landfill operations. . . . Under the authority of the Act of Pennsylvania DER is given broad power to regulate waste disposal and landfill systems. It is the legislative judgment that unified statewide regulations of landfills is the best method for protecting the soundness and integrity of landfill systems. The Act in our view unequivocally provides that municipalities are excluded from the regulation of landfills directly or indirectly by implication.

Id., at 10-11.

The Court therefore concluded that because the regulation of landfills was preempted by the State Act and the regulations pursuant thereto, and because the ordinance impermissibly impinged upon this area, the township ordinance was invalid as applied to Crown. *Id.*, at 13. The Commonwealth Court affirmed based on the opinion of the court below. *Township of Ross v. Crown Wrecking Co.*, 500 A.2d at 1293.

The same conclusion was reached in *Municipality of Monroeville v. Chambers Development Corporation*, 88 Pa.Commw. Ct. 603, 491 A.2d 307 (1985). In *Monroeville*, the operator of a landfill sought to enjoin the enforcement of an ordinance prohibiting landfill operations dur-

ing certain hours and on certain days. The lower court permanently enjoined enforcement of the ordinance, and the municipality appealed. After reviewing the Act and the explicit and limited powers granted to municipalities under the Act, the Commonwealth Court affirmed. The Court found that the Act specifically permitted municipalities to regulate only in the areas of storage and collection. The ordinance, however, did not apply to either storage or collection but rather applied to the operation of the landfill and the "disposal" of solid waste. The court concluded:

> Given the legislature's specific, detailed provision that municipalities may regulate the "storage" and "collection" of solid waste, the exclusion of "disposal" from the definition of "storage", and the obvious omission of any other permitted areas, we conclude that the legislature did not intend municipalities to have the power to regulate any aspects of the operation of a sanitary landfill.

Id., 88 Pa.Commw.Ct. at 609, 491 A.2d at 311.

These cases are virtually indistinguishable from the case at bar.[6] The ordinances enacted by the Township

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6. Plymouth attempts to distinguish *Crown Wrecking Co.* and *Monroeville* by suggesting that they apply only to sanitary landfills and not to resource recovery facilities such as the one here proposed by the County. This argument ignores the comprehensive intent and language of the Act. The definition of "disposal" under the Act incorporates both incineration and landfilling. 35 P.S. § 6018.103. The application and interpretation of the Act does not vary depending on which method of waste disposal in utilized. DER is empowered to regulate the "processing" of solid waste, the definition of which specifically includes resource recovery

(Continued on following page)

have nothing to do with the storage and collection of solid waste; rather, the ordinances are clear attempts by the Township to regulate the disposal, processing and transportation of solid waste—areas specifically preempted by the State.

Ordinance No. 936 contains height and design capacity restrictions which regulate the operation of the facility and directly affect the amount of waste to be processed. The legislature has empowered DER to regulate in this area, 35 P.S. § 6018.104(6). Moreover, the regulations specifically provide that it is DER, and not the municipalities, which sets the standards for the planning, design and operation of any solid waste processing or disposal facility. 25 Pa.Code § 75.21(e). Thus, the Township is clearly preempted from enacting Ordinance No. 936 which regulates the operation of the proposed facility.

Ordinance No. 934 regulates in areas already regulated by DER. The ordinance provides, *inter alia*, that an operator of a solid waste facility must obtain permits

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(Continued from previous page)

facilities. 35 P.S. § 6018.103. The legislature also specifically declared that one of the purposes of the Act was to "encourage the development of resource recovery . . ." 35 P.S. § 6018.102(2).

Furthermore, the standards promulgated by DER pursuant to the Act apply across the board to any solid waste processing or disposal facility, including both resource recovery systems and sanitary landfills. 25 Pa. Code § 75.21(e). A quick perusal of the regulations reveals continued references to solid waste processing or disposal facilities, and an entire section is devoted to standards for solid waste incinerator facilities. 25 Pa. Code § 75.30. Thus, the Act applies equally to both landfills and resource recovery facilities.

from the Township as a condition precedent to the construction or operation of any solid waste processing and disposal facility, pay fees of up to $100,000 to accompany any permit application, and pay a user fee of $ .50 per ton for waste processed or disposed of within the Township. In addition, Ordinance No. 936 requires that applicants seeking a permit must submit to Council an environmental impact study and a fiscal impact study.

These requirements set forth by the Township conflict with DER's authority to regulate under the Act and duplicate DER's regulations uniformly imposed throughout the Commonwealth. DER is granted the authority to issue permits and to specify the terms and conditions thereof, 35 P.S. § 6018.104(7); to require the payments of fees for the processing of any permit application, 35 P.S. § 6018.104(8); to approve or disapprove submitted plans, 35 P.S. § 6018.201(g); and to approve or disapprove a revised plan, 35 P.S. § 6018.201(h). Pursuant thereto, DER has promulgated extensive regulations concerning permits and the permit application process. 25 Pa.Code § 75.21, § 75.22. Thus the Township may not ignore DER's authority to oversee the permit application process and to issue permits; nor may the Township substitute its judgment for that of DER in determining whether a permit should be granted or whether a plan should be approved.

Ordinance No. 934 further regulates the transportation of solid waste—an area also preempted by DER. 35 P.S. § 6018.104(b). DER has promulgated regulations regarding transportation. 25 Pa.Code § 75.21(i) and § 75.29 (i) and (j). The ordinance further regulates vector control procedures and emergency procedures, subjects also regulated by DER. 25 Pa.Code § 75.21(p); 25 Pa.Code

§ 75.30(b). In short, the Court is satisfied that the Act and regulations address all matters sought to be regulated by the ordinances.

In addition to the restrictions imposed by Ordinances Nos. 934 and 936, Ordinance No. 937 restricts the land allowed to be used as a resource recovery district. Initially, the Township created a resource recovery district of approximately 121.4 acres which included approximately 70 acres of County owned land. (N.T. 151-152, Exhibit D-10). Under Ordinance No. 937, the County's land included in the new resource recovery district was limited to approximately 10 acres, and the County's two quarries were excluded. (N.T. 173).

Ordinances Nos. 934, 936 and 937 were all enacted on July 8, 1985 and are admittedly interrelated. (Deposition of Joan Grohoski, April 23, 1986 at 79; N.T. 211). The circumstances surrounding the passage of the ordinances and the limitations which they impose indicates to the Court that Ordinances Nos. 934, 936 and 937 were designed and enacted by Council to exclude the proposed facility from the Township and to restrict and regulate the operations of any facility that will eventually be constructed. Joan Grohoski, the current Chairperson of Plymouth Township Council, explained that the limitations and restrictions in the ordinances were attempts by Council to scale down the size of the facility and limit its tonnage capacity. (Deposition of Joan Grohoski, April 18, 1986 at 94; N.T. 205-206). The ordinances further sought to insure that Council had the "last say" and would be able to retain control over any facility built in the Township's newly created Resource Recovery District. (Grohoski,

April 18, 1986 at 98-99; N.T. 206-207). When asked if she was trying to defeat the Montgomery County resource recovery facility, Mrs. Grohoski candidly admitted that she was "trying to stop it if it were possible". (Grohoski, April 23, 1986 at 34; N.T. 209).

This type of municipal regulation is precisely the kind of local interference that the legislature sought to avoid. As the Court found in *Crown Wrecking Co., Inc. v. Township of Ross, supra.*, the Act manifests the legislative intent to occupy the field of solid waste management, thereby excluding municipalities from regulating in this field. The best method for protecting the soundness and integrity of the solid waste management system is through unified, state-wide regulations. *Id.*, at 10-11. Quoting from *Duqusne Light Co. v. Upper St. Clair, supra.*, the *Crown* Court stated:

> Local authorities not only are ill-equipped to comprehend the needs of the public beyond their jurisdiction, but, and equally important, those authorities, if they had the power to regulate, necessarily would exercise that power with an eye toward the local situation and not with the best interests of the public at large as the point of reference.

Crown Wrecking Co., Inc. v. Township of Ross, supra, at 11; quoting *Duquesne Light Co. v. Upper St. Clair*, 377 Pa. at 336, 105 A.2d at 293.

Such is the case in the instant matter. By enacting Ordinances Nos. 934, 936 and 937 Council was trying to do what it believed to be in the best interests of Plymouth Township. However, the effect of the ordinances frustrates the intent of the Act and dismantles any comprehensive and regional solid waste management planning. As

of January 20, 1986, seventeen of the twenty-four municipalities in Solid Waste Districts 1 and 2 have executed a contract with the County committing their municipal waste streams to the proposed resource recovery facility. (N.T. 7-8, 188-189). These municipalities are now left without a plan for the management of their solid waste. The intent of the Act is clearly to avoid such a result. The Court must therefore conclude that Ordinances Nos. 934, 936 and 937 are invalid as applied to the proposed resource recovery facility due to preemption by the Solid Waste Management Act.

The County further seeks the invalidation of other already existing Township zoning ordinances as applied to the proposed resource recovery facility. Specifically, the County refers to Section 10 of the Township Code which requires prior approval by the Township Air Pollution Control Board before the construction of the facility may be commenced and also imposes air pollution regulations upon the facility; Section 23 of the Township Code, which requires a written permit from the superintendent for the East Norriton-Plymouth Joint Sewer Authority before the facility may be connected to the Authority's sewer line; Section 5 of the Township Code, which requires that a building permit be obtained before the commencement of any construction in the Township; and Ordinance No. 837, which requires Council's approval before land development may occur and further requires an applicant to file with Council numerous detailed plans regarding the proposed development.

Regarding the air and water regulations in the Township Code, we note that plans submitted to DER for review

must consider the effect a facility will have on the environment including air, water, land and other natural resources. 35 P.S. § 6018.201(e)(1) and (3). A permit may be denied or revoked if a plan fails to comply with State pollution control statutes. 35 P.S. § 6018.503(c). As with the fiscal and environmental impact studies required by Ordinance No. 936, the Township Code imposes duplicate procedures on permit applicants already imposed by DER. A quick perusal of the multi-volume documents contained in the County's permit application (Exhibits D-30, D-31) reveals extensive information as to economic impact, environmental effects, design technology, plans and specifications all required by DER. Should a municipality object to a particular aspect of a permit application, the appropriate remedy is for the municipality to recommend to DER the conditions upon, revisions to, or disapproval of the permit. 35 P.S. § 6018.504.

Inasmuch as the Act preempts the regulation of the proposed facility, and the application of these portions of the Township Code could potentially interfere with the State's preemption in this field, those portions of the Code and ordinances are held to be unenforceable as applied to the County's proposed plan. This would be so even if no actual interference exists. The application of the preemption doctrine does not require actual conflict between State and municipal laws; rather, "[i]t is the potential rather than actual conflict between state and municipal laws" that provides the justification for the legislatively mandated statewide regulation of solid waste processing or disposal facilities. *Crown Wrecking Co., Inc. v. Township of Ross, supra*, at 13. Thus, with regard to the County's proposed resource recovery facility, Sections

5, 10 and 23 of the Township Code and Ordinance No. 837, are also preempted by the Act and are not enforceable.[7]

A review of the Solid Waste Management Act, the regulations promulgated thereunder by DER and the relevant case law requires this court to conclude that the State has preempted the field of solid waste processing and disposal. Because the Township's ordinances infringe upon the State's exclusive authority to regulate in this area, we

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7. The cases cited by the Township supporting enforceability are not helpful. In *Greene Township v. Kuhl*, 32 Pa. Commw. Ct. 592, 379 A.2d 1383 (1977), the Commonwealth Court held that the builders of a sanitary landfill were required to obtain municipal building permits in addition to the permits issued by DER because the Solid Waste Management Act in effect at that time (the Act of July 31, 1968, P.L. 788, as amended, 35 P.S. § 6001 et seq.), did not contain a clear legislative intent to preempt local zoning regulations. The new Act, however, does express the legislative intent for state preemption, and the courts have so found. *Crown Wrecking Co., Inc. v. Township of Ross, supra; Municipality of Monroeville v. Chambers Development Corp., supra.*

The Township further relies on *Township of Middletown v. County of Delaware*, 86 Pa. Commw. Ct. 501, 485 A.2d 535 (1984) where the Commonwealth Court analyzed the Delaware County Home Rule Charter and the Municipalities Planning Code and found that the zoning regulations of a home rule municipality were paramount and required the County to comply with all zoning and building restrictions. This case, however, has recently been reversed by the Pennsylvania Supreme Court in *County of Delaware v. Township of Middletown*, — Pa. —, — A.2d —, (No. 73 E.D. 1985) June 27, 1986, Zappala, J., which found that statutory analysis was unnecessary when the Home Rule Charter specifically provided that the Township could not regulate so as to infringe the operation of another political subdivision. The Township was therefore bound by its Charter from interfering with the County's proposed construction of a resource recovery facility on County owned land located within the Township.

hold that Ordinances Nos. 837, 934, 936 and 937 and Sections 5, 10 and 23 of the Township Code are invalid and unenforceable as applied to the County.

CONCLUSIONS OF LAW

The court adopts and incorporates herein by reference all of the County's proposed conclusions of law (attached and incorporated herein as Exhibit "C").

Reserved Rulings on Evidence

1. Objection sustained as to Mr. Richard Koch's testimony regarding the "not in my backyard" approach.
2. D-36; objection over-ruled.
3. D-21; objection over-ruled.
4. D-22; objection over-ruled.
5. D-32; objection over-ruled.
6. D-23; objection over-ruled.
7. Deposition of Mr. Robert Wurzbach; objection over-ruled.
8. D-7; objection over-ruled.
9. P-10; objection over-ruled.
10. P-15; objection sustained.

EXHIBIT A

TOWNSHIP OF PLYMOUTH	)	COURT OF
	)	COMMON PLEAS
v.	)	MONTGOMERY
	)	COUNTY
COUNTY OF MONTGOMERY	)	NO. 85-19292

TOWNSHIP OF PLYMOUTH	)	COURT OF
	)	COMMON PLEAS
v.	)	MONTGOMERY
	)	COUNTY
COUNTY OF MONTGOMERY	)	NO. 85-19293

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW FOR PHASE I TRIAL

I. PROPOSED FINDINGS OF FACT
FOR PHASE I TRIAL

1. The County of Montgomery ("County") is a county of the Second Class A of the Commonwealth of Pennsylvania, with an address at the Courthouse, Norristown, Pennsylvania 19404. [N.T. 4]

2. Plymouth Township ("the Township") is a former first class township which has adopted a Home Rule Charter, situated within the boundaries of the County, with an address of Plymouth Township Building, 700 Belvoir Road, Plymouth Township, Pennsylvania 19401. [N.T. 4]

3. The County and the Township executed a Stipulation which limited the issues to be tried during the May 7-9 consolidated trial to (a) jurisdiction and (b) preemption. The County reserved its right to litigate all other issues during a continuation of the trial, if necessary. [N.T. 12]

A. Trash Crisis

4. There is a municipal waste disposal crisis in southeastern Pennsylvania which becomes more critical every day as existing landfills reach their capacity. [N.T. 25, 28, 29, 30, 41, 43, 44-46, 51, 118, 141-142, 153, 247-250, 292, Exhibit D-2 (xi. xvi, 4-11—4-19, 5-10—5-17), Exhibit D-4, Exhibit D-6, Exhibit D-8, Exhibit D-9, Exhibit D-38]

5. The amount of refuse that is being generated in southeastern Pennsylvania is outstripping the disposal capacity. [N.T. 28]

6. Historically, nearly all of the County municipal waste has been disposed of by landfilling. [N.T. 41, 42]

7. Most of the waste generated by the municipalities in the eastern part of the County was disposed of at the Montgomery County landfill until it closed on December 31, 1985. [N.T. 41, 43, 112-113]

8. There are no new refuse disposal facilities being developed in eastern Pennsylvania other than the Montgomery County resource recovery facility. [N.T. 28]

9. There are no facilities in the Delaware Valley that can meet the long term municipal waste disposal demands of Montgomery County. [N.T. 28]

10. All existing public and private landfills presently permitted within the borders of the County will be filled to capacity within the next two to three years. [N.T. 47]

11. All landfills within the Delaware Valley which are accessible for any of the municipal waste generated within the County will be filled to capacity within the next three to four years. [N.T. 41-47, 48, 49]

12. There is no landfill in the Delaware Valley which is available to take all of the County's trash for the next three to four years. [N.T. 47]

13. It has become necessary to take refuse further and further away from the areas in which it is generated. [N.T. 28]

14. At least some of the Township's trash is being taken as far away as the Harrisburg incinerator. [N.T. 84, 212]

15. It is neither cost effective nor responsible solid waste management practice to export trash to distant locations. [N.T. 49-50, 97-98]

16. A long term solution to the trash crisis is necessary. [N.T. 82, 97-98, 99, Exhibit D-1, Exhibit D-2, Exhibit D-4]

17. In 1980, in recognition that inadequate solid waste practices "cause irreparable harm to the public health, safety and welfare," the Legislature passed the Solid Waste Management Act, stressing the need for area-wide planning to solve the solid waste crisis and encouraging the development of resource recovery as a means of managing solid waste, conserving resources, and supplying energy. [Exhibit P-6]

18. The Commonwealth of Pennsylvania, Department of Environmental Resources ("D.E.R.") has identified a waste disposal problem within the County. [N.T. 113-114, Exhibit D-4]

19. It is inefficient and uneconomical for townships and boroughs in the County to attempt to resolve the

municipal waste management crisis on an individual basis. [N.T. 79, 133, 196, Exhibit D-2 (xi, xii, 5-17, 5-18, 5-22—5-24, 7-1—7-4)]

20. Because of heated political pressure whenever a waste disposal facility is proposed in any particular community, local township and borough elected officials are generally unable to achieve the goal of area-wide planning. [N.T. 25, 30, 31, 71, 72, 209, 286, Exhibit D-1]

21. Because of the typicality of local reaction to proposed disposal facilities, the phrase "not-in-my-backyard" ("N.I.M.B.Y.") has been coined and used extensively throughout the literaure. [N.T. 30-31, Exhibit D-1]

22. Resource recovery is the most feasible solution to solving the solid waste problem. [N.T. 231-233, 247-250, Exhibit D-2 (4-37, 7-61, 7-67—7-72, 8-1—8-4), Exhibit P-6]

23. The Chairman of the Township Council admitted during the April 15, 1985 Council meeting:

> Sanitary landfills are not what we want today. The technology is not the right techonolgy. The mass-burn facility today appears to be the right facility to handle our solid waste problem, all right.
>
> We, a year and a half ago, were opposed to the County building a mass-burn facility in our Township. We advocated a compacting station where you bring the trash in, squeeze it into big, huge bricks and then take it out to the landfills. There are no more landfills in the State of Pennsylvania. They are closing them. There were 1100 landfills about five years ago. It's down now to about 285, and it is projected that there will be only about 20 in about four years from now. There will not be any landfills.

* * *

> Now, there are a lot of different techonologies. There is the mass-burn facility. There is the facility that you heard about in Philadelphia called refuse derived fuel where they take the fuel, grind it up and make it into pellets and burn the pellets. There are all kinds of technology.
>
> There is technology where . . . you . . . pour the trash into molten lead and make charcoal out of it. It might be the best thing since sliced bread, but it doesn't work today.
>
> So today the best thing that is out there is this mass-burn technology and it has been working. It is working in about 55 counties, in Europe, and it is working in this country as well."

[N.T. 231-233]

24. It will take thirty-three months from the issuance of a notice to proceed before the proposed County resource facility could be operational. [N.T. 49, 155, 199, 262, Exhibit D-9]

25. A long delay in the commencement of construction will result in the loss of the critical tax-exempt financing, the County taxpayer will be subjected to a forfeiture of at least $2,500,000, and the public health, safety and welfare will be irreparably harmed. [Exhibit P-6; Exhibit D-2 (10-2, 10-4), Exhibit D-25]

26. In order to solve the County municipal waste management crisis in accordance with the objectives expressed by the Legislature and to avoid irreparable harm to the public, the County must promptly commence and complete construction of the proposed resource recovery facility. [N.T. 25, 28, 29, 30, 41, 43, 47, 49, 118, 155, 199, 262, Exhibit D-2 (xvi, 5-10—5-17), Exhibit D-6, Exhibit D-8, Exhibit D-9, Exhibit P-6]

B. County's Response To Trash Crisis

27. In late 1982 and early 1983, all municipalities within Montgomery County adopted formal Resolutions authorizing the County to perform the planning requirements of the Solid Waste Management Act on their behalf at the County level. [N.T. 196, Exhibit D-2 (xi, xvi, 1-1), Exhibit P-6]

28. On October 11, 1982, Plymouth Township passed Resolution 1982-39 authorizing Montgomery County to develop a County-wide comprehensive municipal waste management plan. [N.T. 113-114, Stipulation ¶9, Exhibit D-4]

29. Township Resolution 1982-39 stated, in pertinent part:

RESOLUTION 1982-39

PLANNING REQUIREMENTS OF ACT 97
PENNSYLVANIA SOLID WASTE
MANAGEMENT ACT

WHEREAS, the General Assembly of Pennsylvania has passed the Pennsylvania Solid Waste Management Act, Act. No. 97 of 1980, and it was signed into law by the Governor of the Commonwealth; and

WHEREAS, Act 97 requires that each municipality in the Commonwealth shall submit to the Department of Environmental Resources an officially adopted plan for a solid waste management system serving areas within its jurisdiction when they have a population density greater than three hundred (300) persons per square mile, or when a solid waste problem exists in any municipality of the Commonwealth; and

* * *

WHEREAS, the municipalities of Montgomery County do not have legal access to a solid waste dis-

posal site which has adequate capacity for the next ten (10) years for the disposal of their municipal waste at a facility which has a permit under Act 97, and therefore, the Department of Environmental Resources has identified that waste problem or potential waste problem exists; and

* * *

NOW, THEREFORE, BE IT RESOLVED that the Council of Plymouth Township hereby agree that the planning requirements of Act 97 should be accomplished at the County level on behalf of the municipalities and the Council of the Township of Plymouth will cooperate in the preparation of such a plan.

* * *

PLYMOUTH TOWNSHIP COUNCIL
By: ROBERT D. WURZBACH, Chairman

* * *

Attest: JAMES T. MITCHELL, Manager/Secretary
Adopted—October 11, 1982

[N.T. 113-114, Exhibit D-4]

30. Pursuant to its mandate under Act 97, the County initiated development of a comprehensive municipal waste management plan. To assist in its efforts, the County engaged Gannett Fleming Corddry and Carpenter, Inc., now known as Gannett Fleming Environmental Engineers, Inc. ("Gannett Fleming"), a nationally recognized consulting firm in solid waste management. [N.T. 13-16, 32-33, Exhibit D-2 (xii, xvi), Exhibit P-6]

31. In December 1983, after considering available sites, estimated life, transportation and environmental conditions, Gannett Fleming submitted a draft plan to the County for internal review and comment. [N.T. 81-82, Exhibit D-2 (8-5—8-6)]

32. After analyzing all of the alternatives, the County concluded that a resource recovery facility presented the best alternative for solving the waste disposal crisis. [N.T. 81-82, 231-232, 247-250, Exhibit D-2 (8-1, 8-3—8-4)].

33. The plan, as developed through December, 1983, contemplated that a single mass burn resource recovery facility with a design capacity of 1,800 tons per day would be constructed in the Township on a 111.6 acre parcel owned by the County to process all of the County's waste disposal needs. [N.T. 34-35, 81-82, 112]

34. After gathering comments from its local municipalities, the County revised the plan to include six solid waste districts to be served by six different facilities, except that any of the districts could choose to combine and utilize a single facility. The districts were numbered and designated Districts 1-6. [N.T. 35-36, 64, 75, Exhibit D-2 (xii-xiii, 8-4—8-7), Exhibit P-6]

35. The Township is located within District 2. [N.T. 36]

36. At the time that the plan was undergoing revision, the six solid waste districts formed Committees to discuss the siting and implementation of resources recovery facilities in their areas. [N.T. 36, Exhibit D-5]

37. On August 20, 1984, the Township Council appointed its Chairman, Robert D. Wurzbach ("Wurzbach"), as the Township's representative to the Committee to work on the siting and implementing of the resource recovery facility in District 2. [N.T. 114-115, 122, Exhibit D-5]

38. Wurzbach was subsequently elected Chairman of District 2. [N.T. 36]

39. The authorized representatives from Districts 1 and 2 decided that one facility should be constructed to service the needs of both districts. A consensus was reached that the suitable site would be the County-owned property in the Township. [N.T. 37, 72, 75, 143, 147, 205, Exhibit D-2 (xiii, xiv and 8-9—8-10), Exhibit D-7, Exhibit P-6]

40. Officials from Districts 1 and 2 requested that the two disposal facilities for Districts 1 and 2 be combined into one facility to be located within the Township. [N.T. 37-38, 165-166, Exhibit D-2 (xiii, xiv and 8-9—8-10), Exhibit D-36, Exhibit P-6]

41. On November 2, 1984, the Township, acknowledging the serious solid waste disposal problem in the region, wrote to the County officially to advise that the Township desired to participate in the inter-municipal solid waste disposal program and to encourage the County to assist municipalities with the disposal of solid waste. [N.T. 118, Exhibit D-6]

42. The County sought to establish a good working relationship with the Township. [N.T. 294]

43. In January, 1985, to assure local participation in the planning and implementation process for the joint facility, the County formed the Montgomery County Solid Waste Management Committee ("Solid Waste Management Committee"). [N.T. 38, 102, 294]

44. Wurzbach, Chairman of the Township's Council during the relevant period, was a member of the Solid

Waste Management Committee and regularly attended its meetings. [N.T. 38, 100, 103, 121]

45. The first task of the Solid Waste Management Committee was to prepare a comprehensive Request for Proposals for a joint facility for Districts 1 and 2 ("RFP"). [N.T. 38, 100]

46. Two-thirds of the municipal waste in the County is generated by Districts 1 and 2. [N.T. 51, Exhibit D-2 (4-21—4-22,7-6—7-7)]

47. The RFP called for a 1,200 tons per day capacity resource recovery facility to be located on the County-owned property in the Township. [N.T. 39]

48. From February through May, 1985, Wurzbach, acting as the Township's representative on the Solid Waste Management Committee, participated in the preparation of the RFP for a 1,200 tons per day facility to be located on the County-owned ground in the Township. [N.T. 39, 143-144]

49. Wurzbach succeeded in causing the Solid Waste Management Committee to include in the RFP more stringent air pollution regulations than those which originally had been proposed. [N.T. 238-239]

50. During the meetings of the Solid Waste Management Committee, Wurzbach stated that he was in favor of the 1,200 tons per day facility in the Township. [N.T. 103]

51. In a formal letter dated February 13, 1985 the Township solicitor reaffirmed the Township's position that there would be "no problem with sizing the incin-

erator permitted to a tonnage sufficient to accommodate those communities in Regions 1 and 2 . . ." The full text of this letter reads as follows:

February 13, 1985

Frederic M. Wentz, Esquire
County Solicitor's Office
Montgomery County Court House
Norristown, Pennsylvania 19404

Re: *Plymouth Township v. Montgomery County*

Dear Fred:

This will confirm the conference which you and I held this date in my office.

I conveyed your thoughts to the Chairman of Plymouth Council, Bob Wurzbach, who indicated that he saw no problem with sizing the incinerator permitted to a tonnage sufficient to accommodate those communities in regions 1 and 2 who are willing to commit their waste stream *and* engage in mandatory recycling. Obviously, therefore, we are going to have to get expert engineering advice as to what this tonnage will be.

* * *

Very truly yours,
Arthur Lefkoe

bcc: Robert Wurzbach, Chairman of the Plymouth Township Council
James T. Mitchell, Manager of Plymouth Township

Blind carbon copies of the February 13, 1985 letter were sent to and received by Wurzbach and James T. Mitchell, Manager of the Township, on February 13, 1985. [N.T. 144-147, 225-226, Exhibit D-7]

C. 1,200 Tons Per Day Ordinance

52. On April 15, 1985, the Township adopted an amendment to its zoning ordinance which permitted the proposed 1,200 tons per day facility to be constructed on County-owned land in the township ("the 1,200 tons per day Ordinance") [N.T. 297, Exhibit D-9, Exhibit D-10]

53. The official tape recording shows that at the meeting Wurzbach enthusiastically supported and advocated the adoption of the 1,200 tons per day Ordinance. [N.T. 227-230]

54. The official minutes of the April 15, 1985 meeting of the Township Council accurately report the following:

Special Meeting

April 15, 1985

A special meeting of Plymouth Township Council was held this evening in the Plymouth Township Municipal Building. The following officials were in attendance:

Council: Robert D. Wurzbach, Chairman
Albert DeAngelis, Vice Chairman
Frank J. Zellner
Joan Grohoski
John J. Washeleski

Staff: James T. Mitchell, Manager
Arthur Lefkoe, Solicitor

* * *

An extended discussion concerning the roads which would be utilized, going and coming, from the Resource Recovery facility. The Chairman said Council cannot control the use of State and County roads but the operator of the facility could, and that will be

one of the conditions of approval for a facility. Mr. Klinger said that the courts have held that only reasonable conditions can be imposed and in his opinion this is not a reasonable condition.

• • •

The intent of Council by adopting this Ordinance, is to *solve the solid waste problem* for Plymouth and the eastern portion of Montgomery County, not the entire county. Without this Ordinance, the chances of Philadelphia using the facility are much greater since only one such facility would be permitted in the district. Hopefully, however, there are no guarantees.

Questioned from the audience, the Chairman said that no one sitting on Council wants this type of facility. The point is that the County owns the property presently and was bought seven years ago for the express purpose of being utilized as a solid waste facility for the entire County.

• • •

Mr. Zellner said Council is attempting to close "Pandora's Box"—not open it. He felt that the Township was wide open with the current zoning. He felt that no one can stop a Resource Recovery facility from coming into the Township mainly because the County has property in the Township and purchased it for that express purpose. Originally the County proposed the property be used for all of Montgomery County solid waste which Council opposed. The County has abandoned that plan. He felt by adopting the ordinance the Township can gain a greater amount of control on the operation of a facility of this type. Unfortunately, currently we have Heavy Industrial Zoning which everyone thinks the area is right for such facilities.

• • •

Mr. DeAngelis said the purpose of the meeting tonight was to establish the Resource Recovery Dis-

> trict Ordinance. What we are trying to do is condense the area from 750 acres to 123 acres, so that if and when a facility is constructed, we want some controls. This is the whole purpose of this meeting. Council does not want a facility anymore than you do.
>
> * * *
>
> The Chairman called the question made by Mr. Zellner and seconded by Mr. DeAngelis. The Chairman polled the board—Mr. Zellner, Mr. Washeleski, Mr. DeAngelis and Mr. Wurzbach voted in favor of the ordinance. Mrs. Grohoski voted against. [N.T. 152-155, Exhibit D-9] [Emphasis added]

55. Wurzbach supplied the RFP team with the 1,200 tons per day Ordinance for inclusion into the RFP to be distributed to all interested bidders. [N.T. 39, 104, 243]

56. The 1,200 tons per day Ordinance permitted a facility up to 165 feet in height, with a processing capacity of up to 1,500 tons of municipal waste per day, and a through-put of 1,200 tons per day. The resource recovery district itself included 121.4 acres located within and completely surrounded by a heavy industrial district, and 70 acres of the County-owned land including two quarries. [N.T. 147, 151-152, Exhibit D-10]

57. On April 29, 1985, only two weeks after the 1,200 tons per day Ordinance was enacted and one week before the primary election for Township Council, the Council repealed the 1,200 tons per day Ordinance by a unanimous vote. [Exhibit D-11]

58. Although the stated reason for the repeal was inadequate advertising, the Township never even attempted to readvertise the 1,200 tons per day ordinance. It was considered a "dead issue" immediately upon repeal. [N.T. 130, 273, 277-278, 286]

59. Intense political pressure caused repeal of the 1,200 tons per day Ordinance one week before the primary election for Council. [N.T. 40-41, 209, 285, 286]

60. It would have been contrary to the County's responsibilities under the Solid Waste Management Act to have abandoned the plan to develop a 1,200 tons per day facility on the site in the Township. [N.T. 25, 28, 29, 30, 33, 41, 43, 44-46, 51, 71-72,81-82, 118, 141-142, 153, 247-250, 292, U.S. Treasury Dept. November 27, 1984 Report to President-Tax Reform for Fairness, Simplicity and Economic Growth, May 29, 1985 President's Tax Proposal to Congress for Fairness, Growth and Simplicity, Exhibit P-6, Exhibit D-25 (document 21), 113 Pa.Code § 55.6B5]

61. On May 7, 1985, the County distributed the RFP for a 1,200 tons per day facility to 36 prospective vendors. [N.T. 39, 164-166, Exhibit D-36]

D. Adoption of Ordinance Nos. 934, 936 and 937

62. On May 29, 1985, all members of the Township Council other than Grohoski publicly acknowledged: "Plymouth Township is unanimously opposed to permitting any type of solid waste disposal facility within our township." [N.T. 160-163, Exhibit D-12]

63. On June 7, 1985, the Township Solicitor sent the Council a letter stating:

> The limitation of tonnage for trash transfer stations may well be held by a court to be illegal and invalid as an improper exercise of zoning power bearing no reasonable relationship to the public health and welfare. *If the business was an otherwise permitted use, would*

a restriction on the number of deliveries, shipments, tonnage manufactured or processed be valid? I think not. [Emphasis added]

[N.T. 166-167, Exhibit D-13]

64. On June 12, 1985, the Township Solicitor advised the Council that the Commonwealth Court had decided that the Township could not regulate through zoning the method of operation of a landfill or trash transfer station. [N.T. 169-171, Exhibit D-15]

65. The official minutes of the June 27, 1985 meeting of the Township Council report the following actions:

Special Meeting

June 27, 1985

A special meeting of Plymouth Township Council was held this evening in the Plymouth Township Municipal Building. The following officials were in attendance:

Council: Robert D. Wurzbach, Chairman
Albert DeAngelis, Vice Chairman
Frank J. Zellner
Joan Grohoski
John J. Washeleski

Staff: James T. Mitchell, Manager
Arthur Lefkoe, Solicitor

* * *

The Chairman said the purpose of this meeting is to authorize the Township Manager, Mr. Mitchell, to advertise Council's intent to act on three ordinances at a public meeting on July 8, 1985. The three ordinances that will be considered are (1) the establishment of a Resource Recovery District; (2) amending

the Zoning Map to include the Resource Recovery District, and (3) Solid Waste Management Ordinance.

* * *

Mr. DeAngelis said that he has stated all along that he would not vote for an incinerator and he still does not want an incinerator.

* * *

The Chairman said Council's intent is to consider an ordinance creating a Resource Recovery District under Zoning Ordinance 342. It will be a new district and it would establish certain criteria, setbacks, height limitations, 40 foot height limitations, 250 tons, 50 foot setbacks, basically the same ordinance with the limitation on the tonnage.

* * *

[N.T. 171-172, Exhibit D-16]

66. The resource recovery district amendment proposed on June 27, 1985 differed significantly from the 1,200 tons per day Ordinance which had been repealed in April of 1985:

(a) The design capacity of a resource recovery facility was limited so that only 250 tons of municipal waste could be processed per day instead of 1,500 tons per day.

(b) The design capacity of a facility was further limited to a height (exclusive of stacks) of 40 feet instead of 165 feet, even though the height limitation in the surrounding heavy industrial district is 100 to 200 feet:

(c) A resource recovery facility was permitted only within a designated 36.3 acres resource recovery district, instead of 121.4 acres; and

(d) The County's land included in the new resource recovery district was limited to approximately 10 acres.

instead of 70 acres. [N.T. 172-173, 205-206, Exhibit P-1, Exhibit P-2, Exhibit D-9, Exhibit D-10, Exhibit D-16, Exhibit D-18]

67. These provisions restrict the waste disposal and processing capacity of the facility. [N.T. 205-206, Exhibit D-16]

68. On July 8, 1985, the Township passed Ordinances Nos. 934, 936 and 937. [N.T. 173]

69. These three ordinances are inextricably interrelated and constitute a single legislative scheme to regulate and restrict the operation of resource recovery facilities. [N.T. 158, 211, 251]

70. Although the Township was advised by its solicitor that limitation of tonnage was of questionable validity, it nevertheless proceeded with its legislative scheme for the purpose of keeping all resource recovery facilities out of the Township. [N.T. 258-259, 261]

71. At the April 15, 1985 Council Meeting, Joan Grohoski, the present Chairperson, stated:

> *The hope of Plymouth Township* at that point in time is *from the original onset of this* which was July 23rd [1984], *was to keep it as small as possible and, in fact, the whole theory behind it was let's keep everybody out.* [Emphasis added]

[N.T. 261]

72. Ordinances Nos. 934 and 936 and the Township's Air Pollution Control Ordinance seek to regulate the transportation, processing and disposal of waste in the Township. [N.T. 251-252, 253-254, Exhibit D-18, Exhibit P-1]

73. Ordinance No. 934 regulates the processing and disposal of municipal waste by providing, *inter alia*, that operators of solid waste facilities must obtain permits from the Township, pay fees of up to $100,000 to accompany their permit applications, and pay a user fee of $.50 per ton for waste processed or disposed of within the Township. [N.T. 159, Exhibit D-18]

74. The portion of Ordinance No. 934 regulating the licensing of collectors, the source of their material and the consistency of material also regulates the disposal of waste at the facility. [N.T. 254, Exhibit D-18]

75. Ordinance No. 934 regulates the transportation, processing and disposal of resource recovery facilities by:

(a) Denying access to vehicle which do not have loads fully enclosed within the truck body or which utilize routes other than those designated by the Township;

(b) Requiring the operator of any permitted solid waste disposal facility to clean litter each day from all feeder roads for a distance of 1,500 feet from the entrance of the facility or area;

(c) Requiring vector control procedures to be carried out at a minimum of twice each month to prevent health hazards or nuisances;

(d) Requiring all solid waste disposal facilities to have a written emergency operational plan; and

(e) Requiring that fifty percent of all vehicles delivering solid waste to the facility have a load capacity of not less than forty cubic yards. [N.T. 159-160, 252, 253, Exhibit P-1]

76. Unlike any other Township zoning ordinance, Ordinance No. 936 provides Council with the "last say" on any proposed resource recovery facility, thereby vesting unusual "control" over such facilities in its Council. [N.T. 206-208, Exhibit P-1]

77. The Township's air pollution regulations, Section 10 of the Township Code, restrict the processing and disposal of waste at the facility. [N.T. 158, 253, Exhibit D-11]

78. Despite the fact that D.E.R. must review all of the data required by Ordinances Nos. 934 and 936, the Township intended to hire an outside consultant and duplicate this comprehensive regulation on the local level. [N.T. 159, 255-257, Exhibit P-1, Exhibit D-18]

79. The Township seeks to regulate the transportation, processing and disposal of municipal waste by requiring the submittal of environmental and fiscal impact studies for review. [Exhibit P-1, Exhibit D-18]

80. On July 8, 1985, the Chairman of the Council stated that "starting with our hearings back in July of '84, we stated that our objective was to restrict, regulate, [and] monitor solid waste activities in our Township." [N.T. 182, Exhibit D-17]

E. The Adoption of the Plan and the Signing of the Contracts.

81. The final draft of the Plan, incorporating the joint solution to municipal waste disposal for Districts 1 and 2, was completed in December 1985. [N.T. 41, 184-185, Exhibit D-2 (front cover)]

82. All of the municipalities in the County reviewed and participated in the development of the Plan. [Exhibit P-6]

83. Thereafter, the County formally adopted its Municipal Waste Management Plan ("the Plan") and distributed it to the municipalities. [N.T. 41, 65, 108, 184, Exhibit D-2 (xi—xv), Exhibit P-6]

84. The Plan calls for the development of one 1,200 tons per day resource recovery facility to meet the disposal needs of municipalities in County Districts 1 and 2. [N.T. 185, Exhibit D-2 (viii—viv, 8-9)]

85. The County proposes to construct the facility within the geographical district which the Township has designated for a resource recovery facility. [N.T. 6, Stipulation ¶ 3, site plan included in D.E.R. Permit Application.]

86. The Township has acknowledged the appropriateness of the County's site for a resource recovery facility. [N.T. 209-210, Exhibit D-20]

87. The proposed site, which is centrally located, is uniquely appropriate for a resource recovery facility. [N.T. 3, 81-82, 98, 112, 185-186, 209-210]

88. The resource recovery district is surrounded by the Township's heavy industrial district, where the following uses are permitted: mining; quarrying; removal of natural materials; lime kiln; automobile dismantling; junk establishments; dyeing; warehousing; distributing; metalsmithing; welding; manufacturing or processing of plastics, hardware, furniture, tools, dyes, tobacco products or drugs; and electrical substations. [N.T. 209-210]

89. The site selected for the resource recovery facility has good transportation access, is close to existing

transfer stations and includes two quarries owned by the County. [N.T. 81-82, 210]

90. The Plan proposes that the energy produced from the resource recovery facility be sold to an appropriate electric utility for the benefit of the participating municipalities. [N.T. 186-187, Exhibit D-2 (8-4, 8-6)]

91. D.E.R. has Preliminary Approved the County's Solid Waste Management Plan as to Districts 1 and 2. [N.T. 215-216, Exhibit D-23]

92. On December 16, 1985, mindful of the substantial benefit that the tax-free financing which was available for only several more days would bring to the project, the County and the County Industrial Development Corp. entered into contracts with Dravo Corporation and its wholly-owned subsidiaries Dravo Operations of Montgomery County, Inc. and Dravo Energy Resources of the Montgomery County, Inc. (collectively "Dravo") providing for Dravo to design, construct and operate the 1,200 tons per day resource recovery facility on the County-owned ground in the Township. [N.T. 9, 112, 187-188, Stipulation ¶ 4, Exhibit D-2 (10-2, 10-4) Exhibit D-25 (document 21), 113 Pa.Code § 55.6B5]

93. The County facility will only accept municipal or commercial solid waste, not hazardous or industrial waste. [Exhibit D-25]

94. The County has made a contractual commitment to Dravo that county users will deliver at least 280,000 tons per year of municipal waste to the facility. [N.T. 189, Exhibit D-25]

95. Abington, Ambler, Cheltenham, Conshohocken, East Norriton, Hatboro, Horsham, Lower Moreland, Lower Merion, Narberth, Rockledge, Springfield, Upper Dublin, Upper Merion, Upper Moreland, West Conshohocken and Whitemarsh, seventeen of the twenty-four municipalities in Solid Waste Districts 1 and 2, have executed a contract with the County committing their municipal waste streams to the proposed facility and are depending upon the availability of this facility for disposal of their municipal waste. [N.T. 7-8, 188-189, Exhibit D-25]

96. On December 17, 1985, the County Industrial Development Authority issued tax-exempt bonds in the face amount of $107,000,000 to finance the cost of construction of the resource recovery facility. [N.T. 9, 190, Stipulation ¶ 5, Exhibit D-25]

97. The facility to be constructed is vital to the County's Act 97 comprehensive Plan. [Exhibit P-6]

F. The Township's Pronounced Bias

98. On November 27, 1985, the Township Solicitor wrote a letter to Paul B. Bartle, Chairman of the County Commissioners advising that "the construction of such a facility will not be permitted unless and until a court rules to the contrary." [N.T. 8, Exhibit P-3, Stipulation ¶ 11(b)]

99. On December 11, 1985, the Township filed two lawsuits against the County, both seeking to prevent construction of the resource recovery facility. [N.T. 9-10, 192]

100. On December 18, 1985, the Township Council sent a telegram and the Township's Solicitor sent a letter advis-

ing Montgomery County and the underwriter on the bond issue that even though Plymouth Township's attempt to secure a Temporary Restraining Order prohibiting construction of the facility had not been successful, the Township would oppose the facility through the court system. [N.T. 190-192, Exhibit D-26, Exhibit D-27]

101. On March 28, 1986, the Township solictor wrote a letter to Michael Ellis, Project Director at Dravo advising that the construction of this facility is "illegal" and "will not be given a permit unless the court, in current litigation, rules that the township zoning ordinance is illegal and/or invalid." [N.T. 193, Exhibit D-29]

102. The Chairperson of the Council has admitted that she is trying to do everything possible to stop the resource facility from being constructed in the Township. [N.T. 209]

103. The statements referred to herein, including those in Findings 98 through 102, the repeal of the 1,200 tons per day Ordinance and the adoption of Ordinances 934 and 936 despite their questioned validity, demonstrate the inexorable opposition of the Township to the County resource recovery facility. [N.T. 209, 253, 254, 258-260, 286, Exhibit D-13, Exhibit D-15]

104. The County's evidence that the Township is biased against the proposed facility stands unrefuted. [N.T. 264-277, 287, 289-369]

105. The Township has predetermined that it will not issue permits and approvals for the construction of the resource recovery facility and that it will seek to prevent

the construction of the facility. [N.T. 8-10, 190-193, 209, Exhibit P-3, Exhibit D-26, Exhibit D-27, Exhibit D-29]

106. Unless enjoined and restrained, the Township will continue to interfere with the proposed resource recovery facility, causing irreparable harm to the County, the constituent municipalities and the citizens thereof. [N.T. 8-10, 25, 28, 29, 30, 41, 43, 47, 49, 118, 155, 190-193, 209, Exhibit P-3, Exhibit P-6, Exhibit D-6, Exhibit D-8, Exhibit D-9, Exhibit D-26, Exhibit D-27, Exhibit D-29]

107. It would be futile for the County or Dravo to request permits or approvals for the 1,200 tons per day facility from the Township. [N.T. 130, 279, 281]

108. Pursuit of the statutory process provided by Section 1004(1) of the Municipalities Code would be futile and would result in irreparable harm by wasting desperately needed time and jeopardizing the tax-exempt financing required for the resource recovery facility. [N.T. 43-51, Exhibit D-25]

G. The D.E.R. Permit Approval Process is Underway.

109. On April 15, 1986, the County transmitted to D.E.R. Phase I and Phase II Applications for a Solid Waste Processing Permit. [N.T. 10, 199-200, 213-215, Stipulation ¶ 18, Exhibit D-30, Exhibit D-32]

110. On April 30, 1986, the County transmitted to D.E.R. its Prevention of Significant Deterioration Air Permit Application. [N.T. 10, 199-200, Stipulation ¶ 18, Exhibit D-31]

111. The very matters which the Township has sought to regulate through the challenged ordinances are,

through these comprehensive submissions, now before D.E.R. for review. [N.T. 255-256, Exhibit D-21, Exhibit D-30, Exhibit D-31]

112. D.E.R. has the expertise to review the complex materials submitted, while no one on the Township Council is an expert in this very technical area. [N.T. 204, Exhibit D-21, Exhibit D-30, Exhibit D-31]

EXHIBIT B

TOWNSHIP OF PLYMOUTH	)	COURT OF
	)	COMMON PLEAS
	)	MONTGOMERY
	)	COUNTY
	)	
VS.	)	NO. 85-19293
	)	DECLARATORY
	)	JUDGMENT
COUNTY OF MONTGOMERY	)	ACTION
TOWNSHIP OF PLYMOUTH	)	COURT OF
	)	COMMON PLEAS
	)	MONTGOMERY
	)	COUNTY
VS.	)	
	)	NO. 85-19292
COUNTY OF MONTGOMERY	)	IN EQUITY

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PLAINTIFF, PLYMOUTH TOWNSHIP

I. - FINDINGS OF FACT

1. On July 7, 1980, the Legislature enacted the Solid Waste Management Act (Act 97) [35 P.S. 6018.101 et seq.] effective in sixty (60) days. (Exhibit D-3).

2. Under the revisions of Section 201(c) of Act 97, where the required solid waste management plan encompasses more than one municipality "the required plan . . . shall be submitted . . . by . . . the . . . county . . . with the concurrence of the affected municipalities." [35 P.S. § 6018.201(c)]. [Exhibit D-3, Sec. 201(c)].

3. In the period 1982-1983, the Defendant solicited authorization from the County's municipalities to prepare a county-wide solid waste management plan to be funded with

a grant from DER and with County funds, and all the municipalities in the County authorized the Defendant County to perform this legislatively mandated planning function on their behalf. [Exhibit D-2, page viii, Resolution 86-6, adoted 1/17/86; N.T. 196].

4. The Defendant County plan evolved over a period of three (3) years, involving three (3) drafts, all of which extended beyond the statutorily mandated term of two (2) years from the effective date of the legislation, namely, September 5, 1982. (Koch, N.T. 33-39, 57, 65).

5. As of January, 1985, the plan proposed by the Defendant County divided the County into six (6) solid waste districts with each individual district being required to provide its own disposal facility. (Koch, N.T. 35-36).

6. During the five month period from January, 1985, to July, 1985, the Plaintiff Township held numerous public hearings pertaining to the creation of a resource recovery district in the Township, in which hearings the operation in the district of mass-burn facilities of varying sizes was discussed. (Wurzbach, N.T. 229, 281).

7. The Defendant County, although aware of the nature and occurrence of the public hearings being held by the Plaintiff Township, never asked to be heard at any of those hearings although one of the County Commissioners and the Director of Public Works of the Defendant attended several of those hearings as observers. (Bartle, N.T. 296).

8. The Defendant County, although aware of the nature and occurrence of the public hearings being held by the Plaintiff Township, failed to submit to the Plaintiff

a written request as to the requirements for the proposed County resource recovery facility. (Bartle, N.T. 295).

9. On July 8, 1985, the Council of Plymouth Township adopted Ordinance No. 936, creating a resource recovery district zoning classification limiting the number of mass-burn facilities to one and limiting the size of any such facility to a capacity not greater than 250 tons per day. (Exhibit P-1; and Request for Admission # 32; N.T. 6-7, 173).

10. In addition to certain other lands, ten acres of land owned by Montgomery County in Plymouth Township, were zoned Resource Recovery District by Ordinance No. 937. (Exhibit P-2; Request for Admission 3; N.T. 173).

11. During the year 1985 the County espoused a mass-burn facility in Plymouth Township with a capacity of 1,200 tons per day despite the fact that the County draft plan of January, 1985 did not recommend such a facility. (Koch, N.T. 36).

12. Defendant County was at all times aware of what was occurring in Plymouth Township with respect to its Resource Recovery District zoning classification and was made aware prior to and immediately after the adoption of Ordinances Nos. 936 and 937 that the new ordinance would preclude the 1,200 ton ton per day facility which the County was contemplating at or about that time. (Bartle, N.T. 297-298, Wurzbach, N.T. 126-130).

13. At the time of the adoption of Ordinance No. 936, Plaintiff Township was concerned about solid waste disposal in the Township because of the possibilities of mul-

tiple trash transfer stations and mass-burn facilities since, in addition to the tentative plans for the County's facility the Township had actually received applications for permits for five (5) trash transfer stations and two (2) 1,500 ton per day mass-burn facilities from private developers. (Wurzbach, N.T. 126, 129-130, 269-270).

14. The adoption of Ordinance No. 936 was aimed at all pending proposals for solid waste disposal and not specifically to the Defendant County's proposal alone. (Wurzbach, N.T. 126, 269-270, 282, 283-284, and tape of the Council meeting of 4/15/85, N.T. 262).

15. Defendant County, from July 8, 1985, when Plymouth Township adopted Ordinance No. 936 until the filing of its Answers to Plymouth Township's Complaints on January 8, 1986, a period of six (6) months, took no action to challenge the validity of that Ordinance. (Wurzbach, N.T. 269).

16. Despite the adoption of Ordinance No. 936 by the Plaintiff and despite the failure of the Defendant to challenge those Ordinances, the Defendant nonetheless proceeded with plans to construct a 1,200 ton per day facility in Plymouth Township pursuant to actions to:

a. Solicit municipalities to enter into 20 year contracts to dispose of their municipal solid waste at the proposed facility at undetermined tipping fees (Wurzbach, N.T. 135-138);

b. Enter into contracts with Dravo Corp., Dravo Energy Resources of Montgomery County, Inc., and Dravo Operations of Montgomery County, Inc. for the construc-

tion and operation of the proposed mass-burn facility (Request for Admissions 47, 51 and 52; N.T. 187-189);

c. Arrange for a tax-free bond issue of $107,000,000 to a fund a portion of the cost of construction of the facility as part of which the Defendant County was required to issue a letter of credit in the sum of $2,500,000 to the bond underwriters as indemnification against any loss should the amendment to the Plymouth Township Zoning Ordinance be upheld. (Request for Admission 61; N.T. 190; Exhibit D-25).

17. On January 7, 1986, the Defendant County passed a resolution adopting the December, 1985 draft as its solid waste management plan. (Exhibit D-2, Koch, N.T. 401).

18. The resolution adopted by the Commissioners of the Defendant County recited, inter alia, that municipalities in Solid Waste Districts 1 and 2 met with County officials and requested that a single waste disposal facility be constructed and operated for those two (2) districts.

19. The meeting referred to in the resolution of the Commissioners of the Defendant at which a single waste disposal facility for Solid Waste Districts 1 and 2 was alleged to have been requested never took place. (Wurzbach, N.T. 125 and 134).

20. Under the provisions of 25 Pa. Code § 75.11 (c)(2), a solid waste management plan adopted by a municipality affecting more than one (c) municipality and submitted to DER must contain therein a certification of the adoption of the submitted plan by the affected municipalities.

21. Despite the fact that the Solid Waste Management Plan adopted by the Defendant has been submitted to DER, it has not been submitted to the affected municipalities for adoption. (Koch, N.T. 41 and 67).

22. The existence of the solid waste management crisis within Montgomery County is asserted in the resolution of the Defendant County Commissioners adopting the County's solid waste management plan. (Exhibit D-2).

23. The existence of the solid waste management crisis is based upon studies performed by the County's consulting engineers, which studies found that more waste was being generated by the County than could be disposed of at existing landfills, as the result of which there was deemed to be a crisis. (Koch, N.T. 30, 33).

24. The County's plan rejected the use of landfills as a viable means of solid waste disposal for the reasons that there were environmental problems in obtaining new landfill sites; that the landfill sites would have insufficient capacity as compared to a resource recovery facility; that the County would be required to enter into long term contracts for the dumping of municipal wastes; and that there was no one facility which could accommodate the County's needs for the ten year life of the plan. (Koch, N.T. 44, 81).

25. The County's plan failed to consider the use of multiple landfill sites for the disposal of the County's municipal waste although such a plan would have provided the required long-term solution to the County's waste disposal needs. (Smith, N.T. 338).

26. The County's solid waste management plan identifies sites in Upper Providence Township and in Marl-

boro Township as locations which were environmentally suitable for use as sanitary landfills and which could be operational sooner than the proposed resource recovery facility, which will take 33 months to construct. (Smith, N.T. 339-443).

27. Within the geographical boundaries of Montgomery County the total available capacity for disposal of municipal waste by the landfill method is the equivalent of 2,300 tons per day and, when added to the 250 tons per day capacity of the plant permitted by the Plymouth Township Ordinance, the total available capacity of 2,500 tons per day is more than 40% higher than the expected needs of the County. (Smith, N.T. 342-343).

28. There is no solid waste management crisis in Montgomery County if the use of sanitary landfilling is considered as a means of resolving that crisis. (Smith, N.T. 349).

29. The Solid Waste Management Act, in Section 104, emphasizes area-wide planning. [Exhibit D-3, Sec. 104(3)].

30. The 250-ton per day mass-burn facility permitted under Plymouth Township Ordinance No. 936 will provide 7.3 times the capacity required by the needs of Plymouth Township for disposal of its municipal waste and would serve all of the waste disposal needs of the entire greater Norristown area in 1990, accommodating the waste streams from Plymouth Township, Conshohocken, Norristown, Whitemarsh Township, Whitpain Township, and East Norriton Township, (Koch, N.T. 78)

31. Plymouth Township is the only municipality in Pennsylvania which, in the face of public opposition, has

provided for a resource recovery district which would permit the construction of a mass-burn facility to dispose of more waste than the municipality itself will generate. (Koch, N.T. 78-79).

32. Plaintiff's expert, Dr. Robert H. Smith, by training, education, background and experience in the field of solid waste management is well qualified as an expert to comment on existence or non-existence of a solid waste crisis and on the County's solid waste management plan. (Smith, N.T. 300-306; 320-321).

33. Under the provisions of the Municipalities Planning Code (MPC), challenges to an ordinance or decision of the governing body of a municipality issued under the power to adopt zoning regulations must follow a prescribed procedure which has been declared by the Legislature to be the "exclusive mode" for securing review of such action. [53 P.S. 11001].

34. The provisions of Section 1004 of the MPC outline the procedures to be followed by a landowner who challenges, on substantive grounds, the validity of an ordinance. [53 P.S. § 11004].

35. Defendant Montgomery County did not submit its challenge to Plymouth Township Ordinance Nos. 936 and 937 to the Township Zoning Hearing Board, or to the Township Council, as required by Section 1004 of the MPC. [53 P.S. § 11004].

36. Act 97 provides that solid waste management plans "*shall* take into consideration all aspects of planning, zoning" and other considerations "so as to delineate with precision those portions of the area which may rea-

sonably be expected to be served by a municipal waste management system. . . . " [Exhibit D-3, Sec. 201(e)(2)].

37. Act 97 contains no language expressly pre-empting a municipality's right to zone within its geographical boundaries nor does the Act do so by implication. (Exhibit D-3).

39. Section 617 of the Municipalities Planning Code authorizes the governing body of a municipality, in addition to other remedies, to institute an action to prevent or restrain any act on conduct by which a building on land "is proposed to be erected, constructed . . . or used in violation of any ordinance enacted under this act."

40. The actions of the Defendant threaten a violation of the Plymouth Township Zoning Ordinance as amended by Ordinance No. 936.

41. The Plaintiff is entitled to injunctive relief against the Defendant.

42. The Plaintiff is entitled to a declaration that its Zoning Ordinance, as amended by Ordinance No. 936, is a valid exercise of the zoning power under the Municipalities Planning Code and is enforceable as against the Defendant.

43. The Solid Waste Management Act is not applicable to the Plaintiffs actions in Equity or under the Declaratory Judgment Act and does not preempt local zoning power.

EXHIBIT C

II. PROPOSED CONCLUSIONS OF LAW FOR PHASE I OF TRIAL

A. Jurisdiction

1. The Legislature has declared as a matter of public policy that inadequate solid waste practices "cause irreparable harm to the public health, safety and welfare." 35 P.S. § 6018.102.

2. Resort to an incomplete or biased statutory process would be futile and would cause irreparable harm to the County. *Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 339, 105 A.2d 287, 294 (1954).

3. This Court has jurisdiction over the Complaints in these consolidated actions and the County's Counterclaim and prayers for declaratory relief. 42 Pa. C.S.A. § 931(a); *Shenango Valley Osteopathic Hospital v. Department of Health*, 499 Pa. 39, 46 n.7, 451 A.2d 434 (1982); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 9-11, 383 A.2d 791, 795-96 (1978); *Horne v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975); *Gladwyne Colony, Inc. v. Township of Lower Merion*, 409 Pa. 441, 447, 187 A.2d 549, 552 (1963); *Duquesne Light Co., supra*, 377 Pa. at 339, 105 A.2d at 294; *Heasley v. Operative Plasterers & Cement Finishers International Association*, 324 Pa. 257, 261, 188 A. 206, 208 (1936); *McVay v. Zoning Hearing Board*, 91 Pa.Commw.Ct. 287, 496 A.2d 1328 (1985); *Baker v. Comm., Pa. Human Relations Commission*, 75 Pa.Commw.Ct. 296, 462 A.2d 881, 885 (1983).

4. If this Court finds an ordinance invalid, it has jurisdiction to order a particular use approved. 53 P.S. § 11011(2).

B. Liberal Construction Of Solid Waste Management Act

5. The Solid Waste Management Act must liberally be construed, so as to best achieve the goals and purposes of the Act. 35 P.S. § 6018.901.

C. The County Is Proceeding Pursuant To The Solid Waste Management Act.

6. The County's Municipal Waste Management Plan was formally adopted on January 7, 1986.

7. In the development and preparation of its Municipal Waste Management Plan, the County provided for the participation and review of all affected municipalities. 35 P.S. § 6018.201(b).

8. D.E.R. has "Preliminarily Approv[ed]" the portion of the Plan which covers Solid Waste Districts Nos. 1 and 2, 35 P.S. § 6018.201(g).

9. D.E.R. is charged with the responsibility of reviewing the Montgomery County Solid Waste Management Plan. Any substantive challenge to the conclusions reached therein is not properly before this Court.

10. The County is responsible for implementing the Preliminarily Approved Plan. 35 P.S. § 6018.202(a).

D. The Respective Roles Of D.E.R. And Local Municipalities Under The Solid Waste Management Act.

11. The Legislature has charged D.E.R. with the exclusive authority to develop a "Statewide solid waste management plan in cooperation with local government . . . emphasis shall be given to area-wide planning." 35 P.S. § 6018.104(3).

12. The Solid Waste Management Act has vested D.E.R. with the exclusive authority of regulating the "transportation, processing, treatment and disposal" of all solid waste, including municipal waste. 35 P.S. § 6018.104(6).

13. Under the Solid Waste Management Act, municipalities are preempted from adopting ordinances, regulations and standards except those regulating the "storage" and "collection" of municipal waste generated within their borders. 35 P.S. § 6018.202(b).

14. Pursuant to the Solid Waste Management Act, D.E.R. has exclusive authority to establish standards for the transportation and incineration of solid waste. 25 Pa. Code §§ 75.29 and 75.30.

15. No solid waste incinerator facility may be constructed or operated without the issuance by D.E.R. of solid waste and air permits. 35 P.S. § 6018.501(a) and 25 Pa. Code § 75.30(c) and (e).

16. Standards for solid waste disposal are established by the Environmental Quality Board. 35 P.S. § 6018.105(a) and (i).

17. The Solid Waste Management Act manifests a legislative intention uniformly to regulate the transportation, processing and disposal of municipal waste throughout the Commonwealth. *Crown Wrecking Co., Inc. v. Township of Ross* (C.T. Allegheny Co. 1984), *aff'd* 500 A.2d 1293 (Pa.Commw.Ct. Dec. 1985); *Municipality of Monroeville v. Chambers Development Corporation,* 88 Pa. Commw.Ct. 603, 491 A.2d 307 (1985); *Fiore v. Township of Elizabeth,* 130 P.L.J. 184 (C.T. Allegheny Co. 1981).

18. Pursuant to the Act's grant of exclusive authority, D.E.R. has promulgated regulations which require all solid waste disposal facilities to comply with environmental and operational standards established thereunder:

"(a) A permit shall be required of any person, municipality, State Agency or authority proposing to use or continue to use their land or any other land as a solid waste processing or disposal area.

* * *

(d) All facilities shall comply with the general standards set forth in this Chapter.

(e) *Planning, design*, and *operation* of any solid waste processing or disposal facility or area including, but not limited to resource recovery system, sanitary landfills, incinerators, compost plants, transfer stations, and solid waste salvage operations shall be in accordance with the standards of the Department.

(f) The Department, upon its own recommendation or the recommendation of the Solid Waste Management Advisory Committee will adopt and revise and conduct periodic reviews of such standards as it deems necessary to prevent nuisances and pollution of the air, land, or waters of this Commonwealth. Such standards and revisions will include, but not be limited to, procedures to ensure suitability of the site and the proper operation of the transfer station, sanitary landfill, incinerator, compost plant, solid waste salvage operation, or other solid waste processing or disposal operation.

(g) No person shall operate a solid waste processing or disposal facility area or system which is not in compliance with the provisions of this Chapter.

(h) All areas of solid waste management systems, including all processing and disposal facilities, shall be operated in such manner as to prevent health hazards and environmental degradation." 25 Pa. Code § 75.21. [Emphasis added]

19. The Solid Waste Management Act provides that an application for a permit shall be made on the forms

provided by D.E.R. and shall be accompanied by the plans, designs and data which the department requires. § 6018.502(a).

20. D.E.R. requires applicants for permits to provide extensive information as to economic impact, environmental affects, design technology, plans and specifications. 35 P.S. § 6018.502(a). [Exhibits D-30 and D-31]

21. The Solid Waste Management Act specifically provides that host community input into the permits process shall be through *recommendations to D.E.R.* 35 P.S. § 6018.504.

22. The Solid Waste Management Act precludes veto of a proposed facility by a local municipality. 35 P.S. § 6018.504.

23. The Township's attempts to regulate the transportation, disposal and processing of solid waste are contrary to the explicitly expressed legislative scheme of the Solid Waste Management Act.

24. A dissenting local resident may obtain a hearing before the Environmental Hearing Board, and the Solid Waste Management Act specifically authorizes municipalities to initiate litigation to enforce the provisions of the Act and the regulations promulgated by D.E.R. 35 P.S. § 6018.604(b)

E. The Township's Ordinances Are Preempted By The Solid Waste Management Act.

25. The Township is preempted by the Solid Waste Management Act from regulating, or interfering with the County's efforts to effectuate, the construction and operation of the 1,200 tons per day resource recovery facility.

26. In any event, since the proposed resource recovery facility complies with the site zoning requirements of Ordinances Nos. 936 and 937, the Township is preempted from regulating, or interfering with the County's efforts to effectuate, the construction and operation of the 1,200 tons per day resource recovery facility.

27. The 250 tons per day limitation on design cacapity contained in Section 3302(c) of Township Ordinance No. 936 conflicts with D.E.R's exclusive authority to regulate the planning, design and operation of any resource recovery facility.

28. The forty foot height limitation contained in Section 3301(e) of Ordinance No. 936 conflicts with D.E.R.'s exclusive authority to regulate the planning, design and operation of any resource recovery facility.

29. The requirement of a fiscal impact study dictated by Ordinance No. 936 duplicates and conflicts with Section 201(e) of the Solid Waste Management Act, 35 P.S. § 6018.201(e).

30. The requirement of an environmental impact study dictated by Ordinance No. 936 duplicates and conflicts with D.E.R.'s regulations and standards governing pollution of the air, land, or waters of the Commonwealth.

31. D.E.R. has been vested with exclusive jurisdiction to regulate the environmental and fiscal impacts of solid waste disposal facilities and to issue permits to construct or operate any such facility.

32. Ordinance No. 934, which requires a Township permit for the establishment and operation of a solid waste processing and disposal facility, together with a fee

of up to $100,000, conflicts with and is preempted by the Solid Waste Management Act and D.E.R. regulations.

33. Ordinance No. 934 improperly imposes regulation of the transportation, processing and disposal of solid waste disposal facilities by:

(a) Denying access to vehicles which do not have loads fully enclosed within the truck body or which utilize routes other than those designated by the Township;

(b) Requiring the operator of any permitted solid waste disposal facility to clean litter each day from all feeder roads for a distance of 1,500 feet from the entrance of the facility or area;

(c) Requiring vector control procedures to be carried out at a minimum of twice each month to prevent health hazards or nuisances;

(d) Requiring all solid waste disposal facilities to have a written emergency operational plan; and

(e) Requiring that fifty percent of all vehicles delivering solid waste to the facility have a load capacity of not less than forty cubic yards.

34. The local regulations noted in paragraph 33 above conflict with and are preempted by D.E.R. regulations establishing standards for the equipment used in transporting solid waste, 25 Pa. Code § 75.29(i); the operating aspects of transport systems, 25 Pa. Code § 75.29(j), the routes which transport systems may use, 25 Pa. Code § 75.21(i), vector control procedures, 25 Pa. Code § 75.21(p) and emergency procedures, 25 Pa. Code § 75.30(b).

35. The Motor Vehicle Code, 75 Pa.C.S. §§ 3709, 4901-03, 6101-09, preempts the Township from attempting

to regulate vehicle traffic or the cleaning of roadways. *Fiore v. Township of Elizabeth*, 130 P.L.J. 184 (C.P. Allegheny Co. 1981).

36. The imposition by Ordinance No. 934 of a user fee of $.50 on each ton of solid waste processed or disposed of within the Township conflicts with D.E.R.'s exclusive authority to regulate the processing and disposal of solid waste and violates the Uniformity Clause of the Pennsylvania Constitution, Article VIII, Section 1.

37. Section 10 of the Township Code requires prior approval by the Township Air Pollution Control Board before construction of a resource recovery facility and imposes air pollution regulations upon a facility.

38. Section 23 of the Township Code requires a written permit from the superintendent for the East Norriton-Plymouth Joint Sewer Authority before the resource recovery facility may be connected to the Authority's sewer line.

39. Ordinance No. 837 requires approval by the Council before a subdivision or land development may occur, and an applicant for a subdivision or land development approval is required to file with the Council a detailed application plan, an improvement construction plan, a record plan, a land development plan and an as built plan.

40. Section 5 of the Township Code requires that a building permit be obtained before commencement of any construction in the Township.

41. With regard to the County's proposed resource recovery facility, Sections 5, 10 and 23 of the Township

Code and Ordinance No. 837 are preempted by the Solid Waste Management Act and are not enforceable.

42. D.E.R.'s authority to approve a resource recovery facility supersedes the Township's zoning authority.

43. As applied to the proposed County resource recovery facility, Township Ordinances Nos. 837, 934, 936 and 937 and Sections 5, 10 and 23 of the Township Code are preempted by the Solid Waste Management Act and the D.E.R. regulations and are unenforceable.

44. The County has no adequate remedy at law.

45. The County is entitled to injunctive relief.

46. The County is entitled to declaratory relief.

47. The Township is not entitled to injunctive relief.

48. The Township is not entitled to declaratory relief.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

TOWNSHIP OF PLYMOUTH	)	
	)	NO. 85-19292
vs.	)	
	)	IN EQUITY
COUNTY OF MONTGOMERY	)	

DECREE NISI

AND NOW, to WIT, this 12 day of August, 1986, it is hereby decreed:

1. Plymouth Township is permanently enjoined from and shall cease and desist from taking any action other than proceeding with any comments and objections to the Department of Environmental Resources and the Environmental Hearing Board, inconsistent with the expeditious development, construction and operation of the proposed resource recovery famility; and

2. This Court shall retain jurisdiction in order to ensure compliance with this Decree.

/s/ Wilson Bucher
Bucher, J.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

TOWNSHIP OF PLYMOUTH	)	
	)	NO. 85-19292
vs.	)	
	)	IN EQUITY
COUNTY OF MONTGOMERY	)	

TOWNSHIP OF PLYMOUTH	)	
	)	NO. 85-19293
vs.	)	
	)	DECLARATORY
COUNTY OF MONTGOMERY	)	JUDGMENT

JUDGMENT

The jurisdiction and preemption issues having been duly tried and the Court having made its Findings of Fact and Conclusions of Law, which are incorporated herein by reference thereto.

IT IS DECLARED AND ADJUDGED this 12 day of August, 1986 that the Pennsylvania Solid Waste Management Act has preempted the field regulating the transportation, processing and disposal of municipal waste. Accordingly, Plymouth Township Ordinance Nos. 837, 934, 936 and 937 and Sections 5, 10 and 23 of the Plymouth Township Code are unenforceable with respect to the 1,200 tons per day resource recovery facility proposed in the Municipal Waste Management Plan adopted by Montgomery County on January 7, 1986.

/s/ Wilson Bucher
Bucher, J.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

TOWNSHIP OF PLYMOUTH	)	
	;	NOS. 85-19292
vs.	)	85-19293
	)	
COUNTY OF MONTGOMERY	)	

OCTOBER 29, 1986

SUPPLEMENTAL OPINION AND FINAL ORDER

BUCHER, J.

On August 12, 1986, the Court entered an adjudication in Equity and Declaratory Judgment in favor of Defendant Montgomery County and against Plaintiff Plymouth Township. The Township has filed timely Motions for Post-Trial Relief consisting of: a) a Motion for Entry of Judgment and; b) a 75 point Motion for New Trial. This is the matter now pending before the Court.

In its Motion for Relief the Township has done little more than resurrect issues this Court believed finally disposed of following the lengthy trial and extensive, painstaking research which went into the preparation of the adjudication. Thus, it would be an act of supererogation for this Court to rehash in its entirety what has already been thoroughly analyzed, addressed and discussed in the decision. Some brief observations, however, are in order.

The Township generally complains that the Court erred in adopting practically all of the County's proposed findings of fact and all of its conclusions of law. On this point the Court contents itself with observing that if we

endorsed the bulk of the County's findings and conclusions, it was for the obvious reason that they were amply supported by the evidence and the law. In short, on these vague, sweeping allegations[1] the Court will let the record speak for itself. It is with specifics that we are concerned.

Initially the Township challenges the Court's holding that the Township Council's bias, prejudice and predetermination against the County's plan would render futile any attempt by the County to adhere to the administrative remedies provided in Section 11004(1) of the Municipalities Planning Code. But certain facts are stubborn and *uncontradicted:* The Chairman of Township Council agreed with the County's proposal for a resource recovery facility; the Township adopted an amendment to its zoning ordinance which permitted the construction of a 1,200 tons per day facility; this amendment was repealed scarcely two weeks later, ostensibly on account of defective advertising;[2] the Township never readvertised the 1,200 tons per day amendment; Council sent a letter to the editor of a local newspaper detailing unequivocal opposition to "any type of solid waste facility"; and, Council subsequently passed Ordinances 934, 936 and 937 which severely curtailed the Country's solid waste management plan by regulating, *inter alia,* the size of the proposed faility and the amount of trash which could be processed daily.

Given these circumstances, it was permissible for the Court to draw the inference that sufficient bias existed in Council to make submission of a curative amendment to that body a perfectly useless exercise. Clearly, Council was not going to budge from its position. Moreover,

it was open to the Court to conclude that the Zoning Hearing Board would be similarly handicapped if the matter were brought before it, since Board members owe their appointments to Council. The remedies the Township argues were available to the County were remedies in name only; the Township's attitude left them all shell and no substance.

The Township next contends that the Municipalities Planning Code provided the County with a complete and adequate remedy. This argument deserves no more than summary treatment. As we noted in our adjudication, the County was seeking a declaration that the relevant Township Ordinances were invalid by preemption and neither Council nor the Zoning Hearing Board has the power to make such a ruling. Thus, the remedies contained in the Code were manifestly inadequate.

The third and final prong of the Court's basis for jurisdiction is that the County would suffer irreparable harm if the relief it requests is not granted. The Court found that the County and its citizens would be faced with irreparable harm if the County were forced to pursue time consuming administrative remedies because the consequent delay in construction of the proposed facility would exacerbate "the solid waste disposal crisis which confronts Pennsylvania as a whole and the county in particular." The Township attacks this conclusion on two grounds, neither of which is persuasive.

The Township first says that before the Court could make a finding of irreparable harm it was necessary for the Court to determine that present solid waste practices in the County were not merely inadequate but improper as

well. The Township posits this argument on a reading of the Solid Waste Management Act, but offers an interpretation which this Court cannot accept.

The Township focuses on the language of the Act which says: "The Legislature hereby determines, declares and finds that . . . improper and inadequate solid waste practices . . . cause irreparable harm to the public health, safety and welfare." The Township reads the word "and" linking improper and inadequate as conjunctive not disjunctive. Therefore, according to the Township, irreparable harm will result only if disposal practices are both improper *and* inadequate. However, this Court cannot believe that such was the Legislature's meaning, as it is possible to conceive of disposal practices which might be adequate but are nevertheless improper and so lead to irreparable harm. The reverse could also be true. For instance, some landfills might accommodate local trash tonnage but still pose a danger to the public health and welfare because of a threat of contamination to the community's underground water supply. The instant case represents the flip side of the coin. While the Township's amendment to its zoning ordinance allows for a proper method of waste disposal, it precludes the possibility of an adequate one. Under the Township's interpretation both these situations would be outside the scope of the Act, though both are likely sources of irreparable harm. Surely the Legislature did not intend such a result. The only plausible reading of the statute is that the Legislature meant to target all solid waste practices that were productive of irreparable harm, whether improper *or* inadequate.

Secondly, the Township contends that there was no "clear and convincing" testimony that a trash crisis

existed due to inadequate solid waste practices. The Township apparently bases this objection on the fact that the Court found the County's expert witness more credible on the issue than its own. This is hardly a reason for the Court to reverse itself. The trial court, sitting without a jury, is entitled to decide the credibility of witnesses and may believe one expert over another, *Tamaqua Borough v. Rush Township Sewer Authority*, 85 Pa. Cmwlth. 421, 482 A.2d 1167 (1984), and even the uncontradicted opinion of an expert witness is not conclusive and a fact finder need not accept it. *Martin v. Soblotney*, 296 Pa. Super. 145, 442 A.2d 750 (1982), reversed in part 502 Pa. 418, 466 A.2d 1022 (1983). The County's witness was well qualified in the field of solid waste management. The Court found his testimony to be wholly credible, and indicative of a trash crisis which has reached grave proportions.[3] This crisis would engender irreparable harm because unless the County commences construction on the plant almost immediately, residents in the County's most populous districts will be without a viable long-term option for disposing of solid waste just as landfills in the area reach capacity levels. The record so reflects.

In contrast, the Township's witness possessed only minimal credentials essential to qualify as an expert in the field. In fact, it was a close call whether the Township's witness could establish the threshold level of competence to testify as an expert witness at all. When it came down to a question of credibility, the Court had little difficulty in selecting the County's witness over the Township's.

The Court concluded as a matter of law (Conclusion No. 2) and found as a matter of fact (Finding Nos. 25, 26

and 103) that pursuit of futile administrative remedies would occasion irreparable harm because it is imperative that the County begin construction of the proposed facility as soon as possible. The Court reiterated its position in the adjudication (p.15). As discussed above, there was ample reason for the Court to reach these findings and conclusions.

A final point on the issue of jurisdiction is the Township's argument that the County's claim for relief should be barred on account of laches. The Township says that had the County proceeded promptly by way of a curative amendment or hearing before the Zoning Hearing Board, "a decision would have been rendered by the time the Township's litigation was instituted and the matter would certainly have been handled in at least as timely a fashion as the hearings held in the instant cases of May of 1986." However, to prove laches, it is not enough to show delay arising from failure to exercise due diligence, since laches will not be imputed where no injury has resulted to the other party by reason of delay. *Kehoe v. Gilroy,* 320 Pa. Super. 206, 467 A.2d 1 (1983). As the township has not alleged or proved any prejudice to it as a result of the County's purported delay, it cannot invoke laches as a defense.

On the issue of preemption, the Township claims that "the Legislature did not expressly preempt the field of solid waste management insofar as regulation by municipalities is concerned."[4] Therefore, the Township argues, the Court must apply the case of *Commonwealth of Pennsylvania, Department of General Services v. Ogontz Area Neighbors Association, et al.*, 505 Pa. 614, 483 A.2d 448

(1984), and determine legislative intent "by implication." For reasons to be discussed herein, the Court finds the approach in *Ogontz Area Neighbors* inapposite to the instant situation.

In the cases of *Crown Wrecking Company v. Township of Ross*, — Pa. Cmwlth. —, 500 A.2d 1293 (1985), and *Municipality of Monroeville v. Chambers Development Corporation*, 88 Pa. Cmwlth. 603, 491 A.2d 307 (1985), the Commonwealth Court held that, notwithstanding the absence of specific language in the Act, the Legislature has divested municipalities of any authority to regulate the operation of solid waste disposal facilities. Given this unequivocal judicial pronouncement, the Court has neither the inclination nor need to apply the test developed in *Ogontz Area Neighbors, supra.*

The Township argues the applicability of *Ogontz Area Neighbors* based on its reading of the appellate decisions in *Township of Middletown v. County of Delaware*, 86 Pa. Cmwlth. 501, 485 A.2d 535 (1984). In *Middletown*, the Commonwealth Court applied the test in *Ogontz* and held that: "If Delaware County would be allowed to construct and operate [a resource recovery] facility, it would frustrate Middletown Township's zoning scheme in this case and in every other case involving a County land use plan conflicting with a Township plan." The Supreme Court reversed, *County of Delaware v. Township of Middletown*, — Pa. —, — A.2d —, (No. 73 E.D. 1985) June 27, 1986, finding that the Township's zoning powers were circumscribed by a provision of the Second Class Township Code. Because the Supreme court mentioned in a footnote to its opinion that the relevant provision of the Second

Class Township Code has no counterpart in any other municipal code, the Township asserts that "the Commonwealth Court's application of the *Ogontz* test and its finding that there was no preemption, still applies to Plymouth Township, a Township of the First Class with a Home Rule Charter." We do not agree. In *Middletown,* the Supreme Court found that statutory construction was *unnecessary* in light of the specific provision in the Second Class Township Code. In short, the Supreme Court did not address the question of the extent to which the Solid Waste Management Act preempts the field.

The Township also attempts to distinguish *Monroeville* and *Crown Wrecking* by suggesting that they apply only to sanitary landfills and not to resource recovery facilities such as the one here proposed by the County. As we noted in our adjudication, this argument ignores the comprehensive intent and language of the Act. It is the *Solid Waste Management Act,* not the Sanitary Landfill Act. Surely the Legislature did not intend the Act to act as a brake on technological advances in the field of solid waste disposal. Yet, should the Court accept the Township's contention it could very easily lead to a paralysis in the development and implementation of new technology desperately needed to alleviate the growing trash crisis. It makes no sense to say that a municipality can regulate a resource recovery facility, but not a sanitary landfill, both of which are designed to accomplish the same end.

The Township's final argument on this point is a feeble one. Since the Township possesses the power to regulate the size of a sanitary landfill, it contends that it also has the power to regulate the size of a resource re-

covery facility. The Township states that regulation of size is not regulation of operation. While that might be true in the case of sanitary landfill, it is not for a resource recovery facility. By regulating the size of a landfill, one is limiting its useful life, but not its daily capacity. The same cannot be said when a resource recovery facility is involved. By regulating the size of the latter facility, a municipality is cutting down on the amount of trash which can be processed daily. This is an impermissible regulation of operation just as much as the time restrictions in *Monroeville* were. It cannot be done.

The final issue raised by the Township is the propriety of the Court's holding that Sections 5, 10 and 23 of the Township Code are invalid and unenforceable as applied to the County. The Court felt it necessary to make this ruling in order to grant the County the complete relief it was seeking in equity, and under the precepts of equity the Court has such a prerogative. Although the chancellor's powers are controlled by law, he still possesses the broad and flexible ability to grant remedial relief where justice and good conscience so require; this is a sacred responsibility which must be exercised with both due diligence and the full consideration of the rights of all, and with an acute awareness of harm that may result from improvident granting of a specific requested relief. *Leonard v. Thornburgh*, 75 Pa. Cmwlth. 553, 463 A.2d 77 (1983). The Court was loathe to give with one hand and take away with the other. The requirements of Sections 5, 10 and 23 could delay commencement of the County's project just as effectively as the impugned Ordinances. Thus, invalidation of those sections was the logical result mandated by "justice and good conscience."[5]

We are amply satisfied that the decree nisi and decision in these consolidated cases should be affirmed.

BY THE COURT:
/s/ Wilson Bucher
S.J.

FOOTNOTES

1. That the Township is striking blindly is evidenced by point 16 of its Motion for Relief wherein it claims error in the Court's adoption of the County's finding of fact No. 60. In its adjudication the Court expressly *excluded* this finding from consideration.

2. We conclude that Township was less than frank in asserting that the Ordinance congenial to the County's proposal was repealed because of defective advertising.

3. Indeed, the existence of a trash crisis in southeastern Pennsylvania generally and Montgomery County in particular is so well known that, had the County so requested, the Court believes it would have been proper to take judicial notice of that fact.

4. The Township cites the case of *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township*, 69 Pa. Cmwlth. 47, 450 A.2d 273 (1982), as authority for the proposition. However, what was said in *Moyer's* is of no relevance here. In *Moyer's* the Commonwealth Court held that the State had not *wholly* preempted the field by passage of the Solid Waste Management Act. This was obvious from the fact that municipalities were accorded the power to regulate the storage and collection of waste. 35 P.S. § 6018.202(b). The Court did not pass upon the question of whether the Legislature had preempted the field in some areas such as regulation of the operation of disposal facilities. That this is so clearly appears from a reading of *Municipality of Monroeville*, discussed *infra* in the text.

5. One should note that the Court declared the pertinent sections of the Township Code invalid only as against the County. Those sections retain full force and effect against all others, no matter what the subject matter of the application.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

TOWNSHIP OF PLYMOUTH	)	
	)	NOS. 85-19292
vs.	)	85-19293
	)	
COUNTY OF MONTGOMERY	)	

O R D E R

AND NOW, this 29th day of October, 1986, the post-trial motions of Plymouth Township are denied and dismissed. The decree nisi in the equity action and the decision in the declaratory judgment action are affirmed.

Judgment is hereby entered in both of the above captioned actions in favor of the County of Montgomery and against the Township of Plymouth.

BY THE COURT:

/s/ Wilson Bucher

S.J.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

3312 C.D. 1986
3313 C.D. 1986

TOWNSHIP OF PLYMOUTH,

Appellant

v.

COUNTY OF MONTGOMERY,

Appellee

ORDER

Upon consideration of appellant's motion to remand this matter, and appellee's reply thereto, it is hereby ordered that said motion is denied. The parties shall proceed with oral argument in this case as scheduled.

BY THE COURT:

/s/
JAMES CRUMLISH, JR.
President Judge

Date: June 8, 1987

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

3312 C.D. 1986
3313 C.D. 1986

TOWNSHIP OF PLYMOUTH,

Appellant

v.

COUNTY OF MONTGOMERY,

Appellee

ORDER

NOW, November 20, 1987,

1. Upon consideration of appellant's motion for leave to file reply and appellee's answer thereto, said motion is hereby granted.

2. Upon consideration of appellant's application for reargument and appellee's answer thereto, said application is hereby denied.

BY THE COURT:

/s/
JAMES CRUMLISH, JR.
President Judge

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

TOWNSHIP OF PLYMOUTH

Petitioner

v.

COUNTY OF MONTGOMERY

Respondent

---

994 E.D. Allocatur Docket 1987

ORDER

On the "*Petition for Allowance of Appeal*":

"October 4, 1988.

Denied.

Per Curiam."

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

December 19, 1988

Stephen M. Feldman,
Esquire
1715 Rittenhouse Square
Philadelphia, PA 19103

Arthur Lefkoe, Esquire
WISLER, PEARLSTINE,
TALONE, CRAIG &
GARRITY
515 Swede Street
Norristown, PA 19401-4880

TOWNSHIP OF PLYMOUTH, PETITIONER v.
COUNTY OF MONTGOMERY

No. 994 E.D. ALLOCATUR DOCKET 1987

Gentlemen:

This is to advise you that the following Order has been endorsed on your Application for Reconsideration of Denial of Petition for Allowance of Appeal, filed in the above captioned matter:

"November 28, 1988.

Denied.

Per Curiam."

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

Supreme Court, U.S.
FILED
MAR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1425

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TOWNSHIP OF PLYMOUTH,

Petitioner,

v.

COUNTY OF MONTGOMERY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT

BRUCE W. KAUFFMAN
SHERYL L. AUERBACH
JAMES J. GREENFIELD
Dilworth, Paxson, Kalish
& Kauffman
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215) 875-7000

Attorneys for Respondent

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

COUNTERSTATEMENT OF QUESTION PRESENTED

Are the due process rights of a civil litigant abridged where an appellate court affirms by relying in part on grounds other than those stated by the trial court, and where all of the appellate court's grounds are premised upon facts which were determined by the trial court following a full and fair adversarial hearing?

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No. 88-1425

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TOWNSHIP OF PLYMOUTH,

Petitioner,

v.

COUNTY OF MONTGOMERY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

I. COUNTERSTATEMENT OF THE CASE

The instant Petition for Certiorari is only the latest in a series of dilatory tactics by petitioner Plymouth Township ("the Township") which are designed to frustrate development of a state-of-the-art waste-to-energy facility by respondent County of Montgomery ("the County") in a heavily industrialized area of the Township. Petitioner has instigated at least three separate and — thus far — uniformly futile actions to prevent construction of the desperately needed County facility. The Township has pursued virtually every step available to it in the appellate

process, including applications for reconsideration upon receiving notice of appellate defeats. Even the timing and substance of the Township's current Petition, filed on the 87th day after the Supreme Court of Pennsylvania refused to reconsider its denial of allocatur,[1] demonstrates that petitioner — which is aware that the County's tax-exempt financing for the project hinges upon expeditious disposition of all related litigation (Petitioner's App. 76, ¶108) — is trying to filibuster the project to death by extending the appellate process for the maximum number of days permitted by Court rules.[2]

In this action the Commonwealth Court of Pennsylvania affirmed the decision of the Court of Common Pleas on two grounds: (1) the Township's ordinances were preempted by the Pennsylvania Solid Waste Management Act insofar as they regulated the operational aspects of solid waste disposal facilities; and (2) the ordinances constituted improper spot zoning. Petitioner misleadingly suggests that the reliance of the Commonwealth Court upon a spot zoning analysis was improper because the issue of spot zoning had not been explicitly raised at trial. To the contrary, all elements supporting the Commonwealth Court's conclusion were fully litigated at trial and emerged from trial as Findings of Fact.

The trial court's Findings of Fact established that initially, until mid-April 1985, petitioner Township supported the proposal for location of the County's facility on County-owned land within the Township, and the Township Council approved an

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1. The Supreme Court of Pennsylvania has twice refused to consider the same question now raised by the Township.

2. It is evident that the simple Petition before this Court, citing only four cases, was prepared by the Township in a few days. The title and signature pages of the Petition list Arthur Lefkoe as counsel for the petitioner Township. When the Supreme Court of Pennsylvania issued its Order refusing to reconsider its denial of allocatur on November 28, 1988, Mr. Lefkoe was the Township Solicitor, but the Township Council relieved Mr. Lefkoe of those duties on January 3, 1989. It therefore appears that the Township's instant Petition was prepared and printed by January 3, 1989, but was deliberately withheld from filing by the Township for at least 51 days, until February 23, 1989, so that the Township could stretch the appellate process to the greatest extent permitted.

ordinance creating a "resource recovery [zoning] district" that would accommodate a waste-to-energy facility of the magnitude and design proposed by the County. (Petitioner's App. 61-65, ¶¶48, 50-56). Only two weeks after that ordinance was approved, however, the Township Council repealed it on spurious grounds in capitulation to what the trial court described as "intense political pressure." (Petitioner's App. 65-66, ¶¶57-59).

On July 8, 1985, after indicating that it was now opposed to the location of any kind of solid waste disposal facility in the Township, the Township Council approved three new ordinances which, according to the trial court, constituted a zoning "scheme" designed "for the purpose of keeping all resource recovery facilities out of the Township." (Petitioner's App. 66-69, ¶¶62-71).

As the Township has acknowledged at page 3 of its Petition, the issue of the trial court's jurisdiction was fully litigated by the parties at trial. Within the context of the jurisdictional issue, the parties contested the question of whether the Township had demonstrated such pervasive bias that it would have been futile to require the County to submit zoning applications to the Township. As demonstrated by colloquies among the parties and the court during trial, the Township was fully aware that factual issues relating to bias would be litigated, and the Township's counsel even insisted that he be given an opportunity to present testimony that would refute the County's evidence of bias. (Respondent's App. 1-3). Following the introduction of testimony and exhibits on that issue, the trial court concluded that the Township's conduct demonstrated "the inexorable opposition of the Township to the County resource recovery facility." (Petitioner's App. 74-75, ¶¶98-103)

The Commonwealth Court relied upon the trial court's factual findings of bias in ruling that the Township's July 8, 1985 ordinances constituted an impermissible scheme of spot zoning. Given the Township's bias against placement of a resource recovery facility within its borders, the Commonwealth Court held that "the unavoidable conclusion is that the zoning provisions in this case are classic examples of spot zoning — zoning provisions adopted to control the use of a specific area of land

without regard to the relationship of those land use controls to the overall plan and the general welfare of the community." (Petitioner's App. 16). Accordingly, the Commonwealth Court held that the ordinances were invalid. (Petitioner's App. 17-18).

It is clear, therefore, that the Commonwealth Court's reliance upon a spot-zoning analysis as one of two grounds for affirming the trial court's holding was based not upon some flight of fancy that was unanticipated by petitioner Township, but upon Findings of Fact reached by the trial court after full litigation by both the Township and County. The Township had ample opportunity to litigate the issue of bias that formed the basis for the Commonwealth Court's holding, and the Township fully availed itself of that opportunity. The Township cannot now complain that it was denied due process.

II. REASONS FOR DENIAL OF THE WRIT

A. The Commonwealth Court Properly Based Its Spot Zoning Analysis Upon Facts Found By The Trial Court And Fully Litigated By The Parties.

In this case the Commonwealth Court's spot zoning analysis was based entirely upon the application of settled Pennsylvania law to facts culled from the comprehensive record compiled by the trial court on the history of the Township's legislative enactments and bias. The Township had full notice, both before and during trial, of all factual issues raised by the County. The Township then demanded and received in open court the opportunity to litigate the factual grounds cited by the Commonwealth Court (Respondent's App. 1-3), and the Township vigorously contested the factual premises advanced by the County. Accordingly, the Township unquestionably was afforded due process with regard to the development of those facts. The Township does not contest this proposition.

B. The Commonwealth Court Was Empowered To Affirm The Trial Court Upon Any Grounds Supported By The Record.

Decisions within the last two decades by federal and Pennsylvania appellate courts establish beyond dispute that petitioner Township suffered no denial of due process when the Commonwealth Court of Pennsylvania affirmed the decision of the trial court upon a determination, *inter alia*, that the Township's ordinances constituted improper spot zoning, even though the spot zoning question had not been considered by the trial court.

This Court has explicitly declined to state a rule as to when an appellate court may resolve an appeal on grounds that had not been considered by the trial court. In fact, this Court stated: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct 2868, 2877, 49 L. Ed. 2d 826, 837 (1976).[3]

Every federal appellate court that has considered this question has held that it could affirm the decision of a district court on any ground supported by the record, even if that ground was not mentioned by the district court. *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987); *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 n.3 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987); *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (3d Cir. 1985), *cert. denied*, 479 U.S. 828, 107 S. Ct. 107, 93 L. Ed. 2d 56 (1986); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985); *Stoetzel v. Continental Textile Corp. of America*, 768 F.2d 217, 222 (8th Cir. 1985); *Estate of Whitt v. Comm'r of Internal Revenue*, 751 F.2d 1548, 1558 (11th Cir.), *cert. denied*, 474 U.S. 1005, 106 S. Ct. 523, 88

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3. Prior to *Singleton*, this Court had taken the position that a correct trial decision should be affirmed, even if the lower court "relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224, 230 (1937), *reh'g denied*, 302 U.S. 781, 58 S. Ct. 478, 82 L. Ed. 603 (1938).

L. Ed. 2d 456 (1985); *Doe v. Anr'g*, 728 F.2d 30, 32 (1st Cir. 1984); *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366, 1369 n.2 (9th Cir. 1982); *Reynolds v. United States*, 643 F.2d 707, 710 (10th Cir.), *cert. denied*, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 85 (1981); *Mims v. Board of Education of Chicago*, 523 F.2d 711, 716 n.2 (7th Cir. 1975). The appellate courts of Pennsylvania consistently have adopted the same view, holding that they may affirm on any ground supported by the record, regardless of whether that ground was expressed by the lower court. *E J. McAleer & Co., Inc. v. Iceland Products, Inc.*, 475 Pa. 610, 613 n.4, 381 A.2d 441, 443 n.4 (1977); *Gwinn v. Kane*, 465 Pa. 269, 279 n.12, 348 A.2d 900, 905 n.12 (1975); *Dept. of Public Welfare v. Dauphin County Social Services for Children and Youth*, 90 Pa. Commw. 295, 299, 495 A.2d 214, 216 (1985).

This unbroken line of federal and Pennsylvania authority establishes that the Township's due process rights do not include a privilege to contest every conceivable legal theory that the appellate courts might apply to the facts developed at trial. Once the Township availed itself of the opportunity to litigate factual issues, it had received full due process. There is no constitutional reason for this Court to permit the Township to extend this litigation into the next decade by returning this case to the Commonwealth Court for further argument on legal holdings, particularly when those holdings were based upon factual findings which the Township helped create.

The cases cited by the Township do not support its position. In *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), cited by the Township at pages 6-7 of its Petition, this Court invalidated statutes that permitted seizures of a person's possessions upon a creditor's *ex parte* application to a court. Under those statutes, the debtor had *no* opportunity to be heard until after deprivation of his property interest. As the procedural history here demonstrates, the Township was afforded complete notice of the factual issues to be contested, participated in a full hearing before the trial court ruled, and was not deprived of any property interest as a result of the trial court's decision. Likewise, *Willner v. Committee on Character*

and Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), cited by the Township, is factually inapposite. In *Willner*, the defendant Committee denied the plaintiff admission to the bar on grounds that his character was questionable, without ever granting the plaintiff a hearing so that he could rebut the allegations. Similarly, in *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948), Michigan systematically allowed conviction on contempt charges without affording the defendant any right to contest the charges against him.

The last case relied upon by the Township, *Holt v. Virginia*, 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965), did not involve a due process question. Instead this Court employed a Sixth Amendment analysis in overturning contempt convictions of two attorneys who had offended the trial court with language contained in a petition they had filed.

Petitioner Township has cited no cases that are even remotely analogous to the case at bar. The Township has no legal basis upon which to contend that an appellate court offends due process when it affirms relying in part on a ground which is new but is premised on facts which were developed by the trial court at a full adversarial hearing. Indeed, it is well settled under federal and Pennsylvania law that the Commonwealth Court was entitled to do precisely what it did — affirm by relying in part on grounds that were not argued below but which were supported by the factual record before it. This is not a case in which this Court should grant a writ of certiorari.

III. CONCLUSION

The Commonwealth Court of Pennsylvania adhered to settled federal and Pennsylvania law by affirming in reliance upon detailed Findings of Fact made by the trial court. Regardless of whether one of the legal theories for affirmance had not been argued before the trial court, the Commonwealth Court was entitled to affirm on any ground supported by the record. Petitioner Township was afforded due process in adversarial proceedings before the trial court, during which the facts relied

upon by the Commonwealth Court were determined. Accordingly, there is no reason for this Court to grant a writ of certiorari to review the judgment of the Commonwealth Court.

Respectfully submitted,

BRUCE W. KAUFFMAN
SHERYL L. AUERBACH
JAMES J. GREENFIELD
DILWORTH, PAXSON, KALISH
& KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215) 875-7000

Attorneys for Respondent

APPENDIX

"MR. LEFKOE: May I interrupt at this time? It's obvious that I have admitted that these facts existed by my response to the Request for Admissions; however, my objection is on the grounds of relevancy. These matters run to the estoppel issue which issue is not in the preemption case which your Honor is hearing.

* * *

If you remember the stipulation which was submitted, your Honor, as a result of that conference, it was limited to the preemption issue. This cannot by any stretch of the imagination be included in the preemption issue.

MR. KAUFFMAN: I must respectfully disagree, your Honor, because if you recall just a couple of hours ago when we had a conference in chambers, Mr. Lefkoe said that he was not stipulating to the bias of the council and that it was something that we had to prove. If this doesn't go to the bias of the council, I can't imagine anything that would.

In April they passed an Ordinance which goes along with everything which Mr. Wurzbach has said is fine and we will go along with it, and then they get the NIMBY syndrome and they rescind the Ordinanee which would have permitted everything the county wanted to do: Twelve hundred tons a day, a height of one hundred sixty-five feet, using all of the county's land or seventy acres of the county land, and then they get the political repercussions in the township, rescind this Ordinance, and pass another one which limits the county to ten acres, cuts the tonnage capacity to two hundred fifty instead of twelve hundred tons and lowers the height limitation from one hundred sixty-five feet to forty feet.

Then they want to argue to this Court that we should go back to this council and expect them to give us any relief before we come to Court.

* * *

MR. LEFKOE: If that is an issue of bias and prejudice then we have opened the door to everything in the world, your Honor.

The issue is not what prior Ordinance had been adopted and what Ordinance had been repealed, but what was the Ordinance in effect when the county finally made its move and was the county's planned facility in violation of our Ordinance.

The bias and prejudice is as to whether the township council can and will give the county a fair hearing on a curative amendment if the county chose to go that route, which they haven't done in almost a year, or whether this indicates bias and prejudice on the part of the Zoning Hearing Board if under the Municipalities Planning Code the county chose to go that route which they haven't done in almost a year. I don't see that anything that happened in connection with the adoption and repeal of the Ordinance in April of 1985 goes to those facts at all.

THE COURT: Well, if it opens the door, it opens the door. I hope it doesn't.

I am going to permit it. I think it is a matter of argument as to how I should interpret these various procedures, so I will permit it as being on the issue of bias and prejudice and not estoppel.

MR. KAUFFMAN: Thank you, your Honor.

MR. LEFKOE: I hope that in view of the admissions of some of these documents — and I consider D-7 to be in this same category — that your Honor will give me latitude when Mr. Wurzbach comes back on the stand tomorrow to have him rebut some of these matters.

THE COURT: Tomorrow we will see what the situation is when he comes back and if anything has to be explored further, we will do it." [Commonwealth Court Record at 582a - 585a].

* * *

* * *

"MR. KAUFFMAN: Defendant's Exhibit 13, Your Honor, is a letter from Mr. Lefkoe to the Council of Plymouth Township dated June 7, 1985, which is stipulated to as authentic.

* * *

MR. KAUFFMAN: Further, your Honor, I think it is very solidly on the issue of bias. When a governmental body is advised by its Solicitor that what they are about to do is illegal and they do it anyhow, it shows the length to which they will go

to exercise the results of their own bias against this particular project.

* * *

MR. KAUFFMAN: I would like to read Paragraph 3, your Honor.

THE COURT: Go ahead. read it.

MR. KAUFFMAN: 'The limitation of tonnage for trash transfer stations may well be held by a court to be illegal and invalid as an improper exercise of zoning power bearing no reasonable relationship to the public health and welfare. If the business was an otherwise permitted use, would a restriction on the number of deliveries, shipments, tonnage manufactured or processed be valid? I think not.'

I think this is relevant to the issue of bias." [Commonwealth Court Record at 600a - 601a].